United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

DLB-MCG-CAT
1/10/69

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

335

No. 21,686

RUSSELL MORTON BROWN, *Appellant,*

v.

EDWARD OLIVER LAMB, and DISPATCH, INC.,
a Pennsylvania Corporation, *Appellees*

Appeal From the United States District Court for the District of Columbia

JOINT APPENDIX

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613 - 15th St., N.W.
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Attorneys for Appellant

October 16, 1968

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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CONTENTS

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Relevant Docket Entries

Civil Docket, U.S. District Court for the District of Columbia,

No. 1292-63

Russell Morton Brown v. Edward Oliver Lamb and Dispatch, Inc.

1963, May 21—Complaint, appearance, jury demand, filed
May 21—both ser 5/21/63
Nov. 5—Motion of deft #2 for summary judgment;
Nov. 5—Motion of deft #1 for summary judgment;

1964, Jan. 9—Order denying motion of defts for summary judgment. McGarraghy, J.
Jan. 23—Answer of deft #1 to complaint;
Jan. 23—Answer of deft #2 to complaint;

* * * * *

1967, Oct. 16—Jury and two alternate jurors sworn; trial begun; respited to October 17, 1967. Matthews, J.

* * * * *

Nov. 1—Jury resumes deliberations; verdict for the plaintiff vs. defendant Edward Oliver Lamb in sum of $150,000.00 and for the plaintiff vs. defendant Dispatch, Inc., a Corp. in sum of $250,000.00. Matthews, J.

Nov. 3—Motion of defts for judgment N.O.V. or in the alternative for a new trial;

Dec. 22—Order granting defts' motion for judgment non obstante verdicts & if judgment is vacated or reversed, a new trial is granted. Matthews, J.

1968, Jan. 18—Notice of appeal by pltff from order of 12/22/67

Complaint

Action To Recover Attorney Fees

1. Jurisdiction is vested in this Court pursuant to the provisions of the Code of Laws for the District of Columbia, the amount at issue being a sum in excess of $10,000.

2. The Plaintiff, Russell Morton Brown, is a lawyer duly admitted to practice in the District of Columbia, and was so qualified on and after August 1, 1953, being at that time engaged in the general practice of law in the District of Columbia in association with J. Howard McGrath, former United States Senator and Attorney General of the United States. The Defendant, Edward Oliver Lamb, is a resident of the City of Maumee, Lucas County, State of Ohio, and is also the president and principal stockholder of the Defendant, Dispatch, Inc., a Pennsylvania corporation engaged in the operation of a television broadcasting station known as WICU-TV, which broadcasts from the City of Erie in the State of Pennsylvania.

3. Shortly after August 1, 1953, the Defendant, Edward Oliver Lamb, had in his own behalf and in behalf of the defendant corporation, engaged the plaintiff to represent him and the defendant corporation, in connection with an application for renewal of the broadcasting license held by the corporate defendant, and worth many millions of dollars. The Federal Communications Commission, an agency of the United States Government, had refused to renew the aforementioned broadcasting license by reason of charges placed against the individual defendant, that he had been a member of the Communist Party; that he had made contributions to the Communist Party and Communist causes, and that he had a close association with the Communist Party, members of the Communist Party and Communist causes over a long period of time, and that for the foregoing reasons the Federal Communications Commission was not convinced that the said Defendant,

Edward Oliver Lamb, was qualified to own a controlling interest in Dispatch, Inc., which corporation held a license to operate Station WICU-TV, located in Erie, Pennsylvania.

4. This case not only involved a huge sum of money, represented by the prospect of a loss of the foregoing license for Station WICU-TV, as well as other radio and television stations with which the individual Defendant was connected in official capacity, and whose licenses would come up for renewal in the future and would meet with the same possible results; but in addition to this, the reputation, character and future of the individual Defendant and his family would suffer irreparable injury if the charges placed against said individual and the resulting rejection of the renewal applications were sustained.

5. The aforesaid action involved extensive court hearings both in the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit, as well as extensive hearings before the Federal Communications Commission between March of 1954 and June of 1957. In addition to the time and effort required during the course of the many proceedings and the hearings, the aforesaid litigation also required extensive research, investigation, review and study, entailing many months of concentrated application, not only in the District of Columbia but in many parts of the country, all of which was of such time-consuming nature as to prevent the Plaintiff from devoting his time and attention to any other work during the period of this litigation.

6. The efforts of the Plaintiff resulted in a tremendous financial advantage to the Defendants as well as to the other corporations with which the individual Defendant was closely associated and controlling stockholder.

7. A fair and reasonable fee for the services which the Plaintiff rendered to the Defendants, and each of them,

was the sum of $200,000 to the individual Defendant, and $300,000 to the corporate Defendant.

8. While the Plaintiff has made numerous demands upon the Defendants for the payment of his fees, the Defendants have failed to do so and continue to refuse to pay such fees.

9. The principal work in connection with the services rendered by Plaintiff to the Defendants was performed in the District of Columbia and most of the witnesses and evidence required in the prosecution of this claim are available exclusively in the District of Columbia. The Defendant has always resided in Ohio, and could not heretofore be found in the District of Columbia, by reason whereof the Plaintiff was unable to prosecute his claim in this jurisdiction.

WHEREFORE Plaintiff prays for judgment against the individual Defendant in the full sum of $200,000.00; and against the corporate Defendant in the full sum of $300,000.00; together with his costs.

RUSSELL MORTON BROWN
Russell Morton Brown

/s/ MILTON M. BURKE
Milton M. Burke
Attorney for Plaintiff
1010 Vermont Avenue, N.W.
Washington 5, D.C.

/s/ MAURICE C. GOODPASTURE
Maurice C. Goodpasture
Attorney for Plaintiff
828 Federal Bar Building
Washington 6, D.C.

Jury Demand

Plaintiff demands trial by jury as to all issues.

/s/ MILTON M. BURKE
Milton M. Burke
Attorney for Plaintiff

Answer of Edward Oliver Lamb

Now comes the Defendant, Edward Oliver Lamb, and by his attorneys, Lowell Goerlich and J. Eugene Farber, and without waiving any objections heretofore taken, answers the Complaint of the Plaintiff as follows:

1. Defendant denies the allegations in Paragraph 1 of the Plaintiff's Complaint.

2. Defendant denies, for lack of knowledge, the allegations in Paragraph 2 of the Plaintiff's Complaint except that said Defendant admits that Defendant, Dispatch, Inc., is a Pennsylvania Corporation organized and existing under the laws of the State of Pennsylvania, and that the Defendant, Edward Oliver Lamb, is a resident of the City of Maumee, Lucas County, State of Ohio; that said Defendant Lamb has never been a resident, inhabitant or citizen of the District of Columbia, and is president of the Defendant, Dispatch, Inc.

3. Defendant denies the allegations in Paragraph 3 of the Plaintiff's Complaint and states that the same are conclusions of law.

4. Defendant denies the allegations in Paragraph 4 of the Plaintiff's Complaint and states that the same are conclusions of law.

5. Defendant denies the allegations contained in Paragraph 5 of the Plaintiff's Complaint and states that the same are conclusions of law.

6. Defendant denies allegations contained in Paragraph 6 of the Plaintiff's Complaint.

7. Plaintiff denies the allegations contained in Paragraph 7 of the Plaintiff's Complaint.

8. Defendant admits that the Plaintiff has made demands upon the Defendant, and to the extent of instituting

a lawsuit in the Court of Common Pleas of Lucas County of Ohio, entitled Russell M. Brown, Plaintiff, vs. Edward Oliver Lamb and Dispatch, Inc., a corporation, Defendants, being Cause No. 186753 on the docket of said Court; that although said suit was filed in 1959, said Plaintiff has failed to obtain a judgment against said Defendants; that said Court has made rulings and entered orders adverse to said Plaintiff; that there is not due and owing to the Plaintiff from the Defendants any sum or sums as alleged in Plaintiff's Complaint; that the present action is vexatious and malicious and instituted without probable cause.

9. The Defendant denies the allegations contained in Paragraph 9 of the Complaint.

First Defense

10. For his first defense, Defendant states that said Defendant Lamb is not and never has been a resident or inhabitant of the District of Columbia; that the Complaint of the Plaintiff alleges a supposed cause of action against Defendant Lamb and Defendant Dispatch, Inc. which is indivisible and inseparable; that the Defendant Dispatch, Inc. is not amenable to suit in the District of Columbia; that the Court does not have jurisdiction over the Defendant Dispatch, Inc.; that Dispatch, Inc. is an indispensable party; and that the Court does not have jurisdiction over Defendant Lamb.

Second Defense

11. Defendant states that there is a misjoinder of parties defendant.

Third Defense

12. For his third defense, Defendant states that the cause of action set forth in the Complaint did not accrue within three years next before the commencement of the action.

Fourth Defense

13. For his fourth defense, Defendant states that the Plaintiff fails to state a claim against the Defendants upon which relief can be granted.

Fifth Defense

14. For his fifth defense, Defendant states that McGrath and Brown was a law firm in Washington, D.C., in 1954 and 1955; that the members of said firm were J. Howard McGrath and the Plaintiff; that said McGrath was employed for the representation of certain legal matters then pending before the Federal Communications Commission, for which the Plaintiff in his Complaint now without legal justification claims compensation, that all the said services alleged to have been rendered in connection with any such litigation or otherwise referred to in the Complaint have been fully paid and compensated for, and that there are no sum or sums due and owing said Plaintiff from said Defendants.

Sixth Defense

15. For his sixth defense, Defendant states that an identical cause of action has been instituted by the Plaintiff against the Defendants, Lamb and Dispatch, Inc., in the Court of Common Pleas, Lucas County, Ohio, as aforesaid; that the actions taken by said Court in said cause are Res Judicata of the claims of the Plaintiff herein.

Seventh Defense

16. For his seventh Defense, Defendant states that by reason of the aforesaid action on the docket of the Court of Common Pleas, Lucas County, Ohio, the Plaintiff's Complaint herein should be dismissed.

Eighth Defense

17. For his eighth defense, Defendant denies each and every allegation contained in Plaintiff's Complaint which is not herein admitted to be true.

Wherefore, said Defendant prays that the Complaint of the Plaintiff be dismissed at Plaintiff's costs and that he may go hence without day.

J. Eugene Farber
838 Spitzer Building
Toledo, Ohio

Lowell Goerlich
Lowell Goerlich
1126 Sixteenth St., N.W.
Washington, D.C. 20036

Attorneys for Defendant

Answer of Dispatch, Inc.

Now comes the defendant, Dispatch, Inc., and by its attorneys, Lowell Goerlich and J. Eugene Farber, and without waiving any objections heretofore taken, answers the Complaint of the Plaintiff as follows:

1. Defendant denies the allegations in Paragraph 1 of the Plaintiff's Complaint.

2. Defendant denies, for lack of knowledge, the allegations in Paragraph 2 of the Plaintiff's Complaint except that said Defendant admits that Defendant, Dispatch, Inc., is a Pennsylvania Corporation organized and existing under the laws of the State of Pennsylvania, and that the Defendant, Edward Oliver Lamb, is a resident of the City of Maumee, Lucas County, State of Ohio, that said Defendant Lamb has never been a resident, inhabitant or citizen of the District of Columbia, and is president of the Defendant, Dispatch, Inc.

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6. Defendant denies allegations contained in Paragraph 6 of the Plaintiff's Complaint.

7. Plaintiff denies the allegations contained in Paragraph 7 of the Plaintiff's Complaint.

8. Defendant admits that the Plaintiff has made demands upon the defendant, and to the extent of instituting a lawsuit in the Court of Common Pleas of Lucas County of Ohio, entitled Russell M. Brown, Plaintiff, vs. Edward Oliver Lamb and Dispatch, Inc., a corporation. defendants, being Cause No. 186753 on the docket of said court, that although said suit was filed in 1959, said Plaintiff has failed to obtain a judgment against said defendants; that said court has made rulings and entered orders adverse to said Plaintiff; that there is not due and owing to the Plaintiff from the Defendants any sum or sums as alleged in Plaintiff's Complaint; that the present action is vexatious and malicious and instituted without probable cause.

9. The Defendant denies the allegations contained in Paragraph 9 of the Complaint.

First Defense

10. For its first defense, the Defendant states that it is a foreign corporation, incorporated under the laws of the State of Pennsylvania, and is not amenable to suit in the District of Columbia, and that said defendant has not transacted any business in the District of Columbia, nor does it have a place of business in the District of Columbia, nor is it a resident or an inhabitant of the District of

Columbia; and that the Defendant is not subject to the jurisdiction of this Court.

Second Defense

11. Defendant states that there is a misjoinder of parties defendant.

Third Defense

12. For its third defense, Defendant states that the cause of action set forth in the Complaint did not accrue within three years before the commencement of the action.

Fourth Defense

13. For its fourth defense, Defendant states that the Plaintiff fails to state a claim against the Defendants upon which relief can be granted.

Fifth Defense

14. For its fifth defense, Defendant states that McGrath and Brown was a law firm in Washington, D.C., in 1954 and 1955, that the members of said firm were J. Howard McGrath and the Plaintiff; that said McGrath was employed for the representation of certain legal matters then pending before the Federal Communications Commission, for which the Plaintiff in his Complaint now without legal justification claims compensation, that all the said services alleged to have been rendered in connection with any such litigation or otherwise referred to in the Complaint have been fully paid and compensated for, and that there are no sum or sums due and owing said Plaintiff from said Defendants.

Sixth Defense

15. For its sixth defense, Defendant states that an identical cause of action has been instituted by the Plaintiff against the Defendants, Lamb and Dispatch, Inc., in the

Court of Common Pleas, Lucas County, Ohio, as aforesaid; that the actions taken by said Court in said cause are Res Judicata of the claims of the Plaintiff herein.

Seventh Defense

16. For its seventh defense, Defendant states that by reason of the aforesaid action on the docket of the Court of Common Pleas, Lucas County, Ohio, the Plaintiff's Complaint herein should be dismissed.

Eighth Defense

17. For its eighth defense, Defendant denies each and every allegation contained in Plaintiff's Complaint which is not herein admitted to be true.

Wherefore, said Defendant prays that the Complaint of the Plaintiff be dismissed at Plaintiff's costs and that it may go hence without day.

J. Eugene Farber
838 Spitzer Building
Toledo, Ohio

Lowell Goerlich
Lowell Goerlich
1126 Sixteenth St., N.W.
Washington, D.C. 20036

Attorneys for Defendant

Motion for Summary Judgment

Now comes the defendant, Edward Oliver Lamb, by his attorneys, Lowell Goerlich and J. Eugene Farber, and moves the Court for summary judgment in favor of said defendant for the reason that upon the face of the complaint, it appears that the Statute of Limitations has run against alleged claim of the plaintiff.

LOWELL GOERLICH
Lowell Goerlich
1126 Sixteenth St., N.W.
Washington, D.C. 20036

J. EUGENE FARBER
838 Spitzer Building
Toledo 4, Ohio

Attorneys for Defendant

November 5, 1963

Order Denying Motion for Summary Judgment

Upon consideration of the motions for summary judgment on the ground that the complaint shows on its face that the Statute of Limitations has run against the claim of the plaintiff, filed herein by the defendants, Edward Oliver Lamb and Dispatch, Inc., together with points and authorities in support of such motions, and the points and authorities in opposition to the same, as well as argument of counsel presented in open court, the Court finds that there is an issue of fact by reason whereof the defendants are not entitled to summary judgment, it is therefore by the Court, this 9th day of January, 1964,

ORDERED:

That the motions of the defendants, and each of them, for summary judgment be, and the same hereby are, denied.

McGARRAGHY
Judge

Jan. 9, 1964

Defendants' Motion for Summary Judgment

NOW COME THE defendants, EDWARD OLIVER LAMB and DISPATCH, INC., through their attorneys of record, and move this Honorable Court to grant a summary judgment in their favor and for reasons state that there is no issue as to the following material facts, and these defendants are entitled to judgment as a matter of law:

1. Plaintiff's claim based upon a simple contract is barred by the three (3) year District of Columbia Statute of Limitations.

NOTICE

To: MILTON M. BURKE, *Esquire*
1010 Vermont Avenue, N.W.
Washington, D.C. 20005

and

MAURICE C. GOODPASTURE, *Esquire*
1815 H Street, N.W.
Washington, D.C. 20006

Attorneys for Plaintiff

Please take notice that you are required to file any opposition to the granting of the above-entitled motion within five (5) days after you have received a copy of same.

MERCIER, SANDERS, BAKER
& SCHNABEL

By .....
N. MEYER BAKER
613 - 15th Street, N.W. #710
Washington, D.C. 20005
Telephone: 638-2241

Attorneys for the Defendants

1967

Order Denying Motion for Summary Judgment

Upon consideration of the motion of the defendants for summary judgment, together with the points and authorities in opposition thereto and the argument presented at the hearings on the same, and it appearing to the Court that there had been no substantial difference in the position of the parties since a similar motion had been denied in this case,

It is by the Court, this 28 day of April 1967

ORDERED:

That the defendants' motion for summary judgment be and the same hereby is denied.

McGARRAGHY
Judge

[Filed December 22, 1967]

Order Granting Defendants' Motion for Judgment Non Obstante Veredicto, or in the Alternative, for a New Trial

This matter coming on for consideration by the Court upon motion by defendants for judgment n.o.v. or in the alternative for a new trial, and upon consideration of the respective points and authorities filed by the defendants and plaintiff, and it appearing to the Court that the statute of limitations had run prior to the filing of this action,[1] that no evidence was adduced at the trial of a character requisite for taking this action out of the statute of limitations,[2] and hence that the motion for judgment n.o.v. should be granted;

AND with respect to so much of defendants' motion as in the alternative seeks a new trial, the Court being of the opinion that in the event the judgment n.o.v. which is to be entered herein for defendants should be thereafter vacated or reversed[3] a new trial should be granted on the ground

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1 D.C. Code, § 12-301 (1967) formerly D.C. Code § 12-201 (1961), limits the bringing of an action on a simple contract, express or implied, to a period of 3 years from the time the right to maintain the action shall have accrued. The plaintiff rendered no services after mid-June 1957 but did not file this action until May 21, 1963.

2 D.C. Code § 12-305 (1961), now D.C. Code § 28-3504 (1967), provides in pertinent part: "In actions of debt or upon the case grounded upon any simple contract, no acknowledgement or promise by words only shall be deemed sufficient evidence of a new or continuing contract whereby to take any case out of the operation of the statute of limitations or to deprive any party of the benefit thereof unless such acknowledgement or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby." See also Hornblower v. George Washington University, 31 App. D.C. 64 (1908); Moore v. Snider, 71 App. D.C., 109 F.2d 840 (1940), cert. den., 309 U.S. 685; Howard University v. Cassell, 75 App. D.C. 75, 126 F.2d 6 (1941), cert. den., 316 U.S. 675, rehearing denied, 316 U.S. 711.

3 Rule 50(c)(1), Federal Rules of Civil Procedure, provides in part: "If the motion for judgment notwithstanding the verdict, provided for in subdivision (b) of this rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial."

that the verdicts are excessive and that the manner in which plaintiff presented his case was such as to prejudice the jury against the defendants;[4]

Now therefore, it is this 22nd day of December 1967:

ORDERED That judgment non obstante veredicto be and the same is hereby entered for the defendants, and it is further

ORDERED That if hereafter said judgment be vacated or reversed, then and in that event, a new trial is granted.

BURNITA SHELTEN MATTHEWS
Judge

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[4] The claim of plaintiff in this action is grounded primarily on services rendered by him in a proceeding before the Federal Communications Commission which question the propriety of the renewal of a television license held by a corporation on the ground that the Commission had information that Mr. Lamb, a controlling officer of the corporation, was a Communist, had Communist affiliations, and had promoted Communism, etc. At the trial of this action plaintiff maintained that in order to show the services he had rendered he must necessarily indicate the charges he had to overcome. However, more emphasis was placed on the charges than on the services, supplemented by prejudicial intimations that the charges were true after all. For instance, planitiff's attorney in final argument said:

> "Ladies and Gentlemen of the Jury, one of the exhibits that was introduced by the Government (referring to the FCC case) was a book written by Mr. Edward Lamb—the defendant in this case—entitled 'The Planned Economy of Soviet Russia', and what is charged by the government against Edward Lamb is the fact that he urged the overthrow of the United States Government by force and violence. And here is what they refer to:
>
> > "If the American planned economy is to be achieved it becomes evident that those who produce, the workers and farmers, and those who defend—this is the militia men—through joint action and organization surely must assume title to the means of production."
>
> *Now, if there ever was a statement that urges the overthrow of this government* by the farmers and the militia men *this is that statement* and this is just one of the many statements that they had of Edward Lamb being made and going into the communist movement, in other words, copies of the Daily Worker, to which Mr. Lamb contributed, and as counsel to the organizations such as the legal tool of the communist party; this is a man who was accused of being a communist fellow traveller and this is the type of evidence that was presented against him. This is the type of evidence that Russell Morton Brown had to overcome." (Emphasis supplied.)

Notice of Appeal

Notice is hereby given this 18th day of January, 1968, that Russell Morton Brown hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 22nd day of December, 1967 in favor of Edward Oliver Lamb and Dispatch, Inc. against said Russell Morton Brown.

/s/ MILTON M. BURKE
Attorney for plaintiff
1010 Vermont Avenue, N. W.
Washington, D. C. 20005

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

[31] The Court: I think I made a great mistake in allowing this man to be put on at all in advance of your plaintiff, because, instead of dealing with the subject matter of your suit, you are bringing out this man's life over the last 20 years, before he had anything to do with the plaintiff.

Mr. Burke: Your Honor, this is the crux of our suit. This is what we are trying to show.

The Court: What he has done for the rest of his life?

Mr. Burke: Yes, Ma'am. We have to show exactly what it is that we saved for this man. We are not suing for a small sum.

The Court: You are suing for services rendered.

Mr. Burke: That is correct, Your Honor.

The Court: All right.

Mr. Burke: But the law is very clear.

The Court: Now, just a minute. You haven't gone into the services at all.

* * * * * * * * * *

[46] The Court: I know, but you are starting out as though this is the main case, instead of starting out with your plaintiff. I am afraid you are confusing the jury. They will think that all this has something to do with the [47] plaintiff's services.

Mr. Burke: Well, we can't put the plaintiff on because he didn't get into this until 1953, or early 1954. But we have to lead up to it.

The Court: Well, you are not saying that your plaintiff had anything to do with the sale to the Tafts of this station, are you?

Mr. Burke: No, the only thing we want to show is that the t/v station had a value of $2 million, or was sold for that, and it had been earning $50,000 a month, or so, wasn't it?

The Court: I will sustain objection to this.

Mr. Burke: Well, I am offering it only for the purpose of showing his condition of wealth.

The Court: Yes, I understand.

Mr. Burke: Which I think I have the right to do.

The Court: All right.

Mr. Hayes: Would Your Honor consider permitting recalling this man after we have put in some of our evidence? I realize that Your Honor is saying that we should show the services of the plaintiff—

The Court: Well, you are putting all these things in and not through the plaintiff, and it is being done in a [48] very confusing way, and without any indication to the jury that this is not something to do with the contract or the claim for services.

Mr. Hayes: Well, that is the reason I asked Your Honor whether or not Your Honor would consider letting us call this man later.

The Court: Well, I am ruling right now that you can't ask him this and I will consider it later.

* * * * * * * * * *

Testimony of Edward Oliver Lamb

By Mr. Burke:

[53] Q. Is it not a fact, sir, that on February 17th, 1948, in connection with your application you had made certain sworn statements which were filed with the application at the Federal Communications Commission and which later were the subject of your difficulties? A. All applications for radio or television stations are based on sworn statements, yes.

Q. And in that application under oath you were asked a number of questions that related to Communist activities, were you not? A. Yes, sir.

Q. And among those questions you were asked was one: "Were you ever a member of the Communist Party?" A. Yes, sir,—I mean, such a question was asked.

Q. And among the questions asked was also: "Did you

ever give any contributions to the Communist causes?'' A. Such a question could have been asked.

Q. Well, it was asked, was it not? A. I suppose so, if you are reading it from that, yes.

Q. And among those questions was whether or not you had associated with or had any dealings with known [54] Communists or Communist front organizations? A. I think that such a question is on the application form, yes.

* * * * * * * * * *

[68] Q. Now Mr. Lamb, getting back to your past as a lawyer, and getting away from the television field for a moment, did you during your practice of law—and by the way, did you have a special field in the practice of law? A. Well I guess so—I represented many many corporations and also represented many many trade unions—in fact most of the national trade unions.

Q. Were you known as— A. Maybe I was a specialist in different branches of the law.

Q. Were you known as a labor lawyer, though? A. Well I hope so.

Q. In that connection, were you working during during a period when there were some Communist elements in labor field? A. Well, I can give you the years when I practiced law and I think then, like now, there may be Communists in the trade unions.

Q. Well in those days, sir, did you have acquaintanceships who had dealings with Louis Budenz [69] who I think was the editor of the Daily Worker? A. I don't think I had any dealings with him but I represented workers in a strike in Toledo of the United Auto Workers—in fact, that was the beginning of the Auto Workers and Louis Budenz came there, as did many many others who became labor agitators, so he was not—I don't think he was a Communist;—I don't know. He may have been—he may have been a Communist—I don't know.

Q. Well, he became editor of the Daily Worker, did he not? A. Well, he became, but I don't think he was at

that time—I may be mistaken about that, I don't know.

Q. I see. A. Louis Budenz had been, I think, I believe a Trotskyite—they called them Trotskyite, and they were anti-Communists and then he became a Communist and the editor of the Daily Worker, and then he became anti-Communist.

Q. Well during the days that he was a Communist and he was the editor of the Daily Worker, did you contribute articles to the Daily Worker? A. In the first place, I don't know when he was the editor of the Daily Worker. [70] I don't know the years, or what his connection was.

As to whether I contributed articles to the Daily Worker, I wrote many many articles for labor newspapers, all the labor newspapers, in the United States, especially after some of the decisions in the cases, but I wrote many articles, and there were many articles that I wrote for newspapers and magazines that were picked up and inserted even without my knowledge, in such publications.

Q. Well—

The Court: Just a moment. Let him finish.

By Mr. Burke:

Q. I am sorry. Had you finished? A. I guess so.

Q. Did you personally direct communications to the Daily Worker to be inserted in the Daily Worker? A. I don't have any recollection of personally directing any communications to that publication—there may have been. I mean, I just don't personally recall having directed or asked them to publish anything of mine. I don't—I just don't recall anything like that.

Q. Well let me ask you this Mr. Lamb— [71] did you send the Daily Worker birthday greetings on an anniversary of that paper? A. Well I don't have any recollection, but if someone comes into my office and asks for a couple of dollars donation and they come in by the thousands—

Q. No, I am not asking you about donations. I am asking you if you sent a telegram to the Daily Worker congratulating them on their anniversary? A. I don't personally recall it—it could have happened. I have congratulated thousands of people.

Q. Well, was not part of your trouble with the WICU-TV station renewal application, in which Mr. Brown represented you, that these items were exhibits which were presented against you and which are contained in the exhibits and the testimony? A. In the first place, J. Howard McGrath—the firm of McGrath and Brown—the law firm—

Q. Well just a moment— A. McGrath and Brown represented me and I just wanted that clarified.

Q. We will clarify that in a moment A. All right.

[72] Q. The question is whether or not these articles in the Daily Worker, and anything else you sent to them—the telegram and so on—were not part of the evidence used against you in that hearing? A. There were clippings, news items, from what they called then the Defense Magazine, I think, and the Daily Worker—I don't recall—but it is true that in that FCC hearing they had taken clippings—many clippings out of many publications, some of which I had never even heard of.

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By Mr. Burke:

[116] Isn't it a fact, sir, that you paid him, General McGrath, a fee of $5,000 just for meeting with Senator McCarthy and making certain that you were not investigated by the McCarthy people? A. That is not the fact. Under any stretch of the imagination. I paid that sum later, after we had had subsequent meetings, when I retained J. Howard McGrath and the firm of McGrath and Brown, and then I did give them $5,000 plus.

Q. You would say if General McGrath makes that statement, he is not telling the truth? A. May I have the question repeated?

Q. You would state if General McGrath made that statement, he is not telling the truth? A. General McGrath would not make that statement. And did not make that statement.

Q. You and I both know that General McGrath is deceased. A. Certainly. But he never made a statement like that when he was alive.

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[120] The Court: Listen, it seems to me you are going into entirely too many matters on this. That you ought to confine yourself to the complaint in this case. The complaint. The way I read this complaint—

Mr. Burke: Your Honor, in this complaint one of the issues is whether or not they lulled Mr. Brown into inaction by their constant promises they would pay him.

The Court: There is nothing here yet about that.

Mr. Burke: One of the things is this Blau case. He said he is involved in this Blau case, and he doesn't want to have any adverse publicity, so please let him go until he gets through with the case and then he will straighten out his fees with him. This is what this man, at this 1959 meeting with [121] General McGrath, told my client.

Now, he brought up the Blau case, in which he said he went there. This brings out our point glaringly. If I can't cover that, how can I cover that particular subject? This is the very substance of our case.

Mr. Baker: If the Court please, I object to all this. It is so far afield. It is wild. He starts with meeting McGrath and winds up with a suit in New York, a totally different case, waiving a deposition before the witness in an effort to contradict him. It has nothing to do with this matter.

Mr. Burke: He just said, Your Honor, Mr. Brown sued Mr. McGrath. It was Mr. Gaughan who sued Mr. McGrath. It was not Brown. Brown never sued him. I had to show him that deposition to show he was making a mistake.

The Court: You are presenting this case in such a disorganized way it is very difficult for anybody to follow it.

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[168] Mr. Burke: Yes, Your Honor, it is right here in these official documents. This is one of the exhibits, and we have five volumes of exhibits, Your Honor. This man represented this Communist and other Communists and Communist organizations, people who had relationships with the Daily Worker, and all of that is set out in here. They set up a case with all these items which was almost impregnable, and Mr. Brown had to stay up days and nights and search for witnesses all over the country to overcome these things, and this is the achievement of this man in doing a wonderful job. And, how am I going to show this to the jury if I am not allowed to bring it out.

Mr. Baker: Well, he is not offering it for that purpose at this point, Your Honor, but he is offering it for the purpose of trying to contradict this witness, and that is the reason I objected. When and if he offers it as part of the FCC case, at that time I could not have any objection to it, but, certainly, I do at this point.

Mr. Burke: Well, I don't see what difference it makes when I offer it.

The Court: Oh, I think there is a considerable difference, and I will stand on my ruling. The objection is [169] sustained.

Mr. Burke: Well, in other words, without prejudice to bringing it out later—

The Court: Anything that the plaintiff did as part of his representation of the defendant can come in.

Mr. Burke: Yes, but doesn't it seem better to bring it out through this defendant, Your Honor? It seems so to me.

The Court: Well, you brought these records here claiming that you wanted the jury to see them.

Mr. Burke: Yes, I have the exhibits, from the record, Your Honor—these are excerpts.

The Court: I have sustained the objection to the reading of this indictment.

Mr. Burke: Well, Your Honor, is that without prejudice to renewing it through the plaintiff?

The Court: Well, now, if the plaintiff wishes to say that he did answer this or some charge like it, or that he had some knowledge about it, he can show that.

Mr. Hayes: Well, Your Honor, he did testify first that he represented him in some steel workers union matter.

The Court: Well, the reading of the indictment wouldn't show that he represented him, Mr. Hayes.

[170] Mr. Hayes: Oh, no, no, but the reading of the indictment refers to after the time that he said that he did represent him, and he also testified that he filed a motion to quash with respect to this particular indictment, and it seems to me that it would have some pertinence here, because the indictment had to do with this Communist situation; and as Mr. Burke has indicated, he did have a mountainous situation to overcome.

The Court: No objection was made to the questions that were asked, but you now want to read the indictment.

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[174] By Mr. Burke:

Q. Mr. Lamb, did you ever hear of the International Labor Defense? A. Oh, yes.

Q. And is that not the legal arm of the Communist Party? A. Well, I don't think so, but I have no knowledge. I'm not an expert on the Communist Party and so I can't tell you.

Q. Was that not the designation of the United States Attorney General given to the International Labor Defense, that it was the legal arm of the Communist Party? A. I wouldn't know that. I have no clear knowledge of it.

Q. You were one of the attorneys for the International Labor Defense, weren't you, sir? A. I probably was asked by the International Labor Defense and many of these

letterhead organizations who would call on many lawyers around the United States to defend civil liberties cases—whether it is a racial matter, whether it is a religious matter, we were civil liberties lawyers.

[175] Q. I asked you whether you were one of the lawyers for the International Labor Defense, Mr. Lamb? A. Well, I might have been asked on some occasion to sign something or represent some fellow in jail, I don't know.

Q. Well, you actually appeared on the cases for them, didn't you? A. Well, I don't have a clear recollection of it. It is very possible I did, but I represented hundreds and really thousands of workers around the United States.

Q. And also Communists? A. Well, if they were members of a union, I represented them whether they were Republican or Democrat or Communist or Socialists, or even Birchites.

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[177] The Court: Well, we'll be here forever if you intend to try and contradict him on all of these points.

Mr. Burke: Oh, I don't intend to try to. We have only selected a few excerpts, we're not going to use the whole five volumes, Your Honor. I didn't intend to go through all of them.

The Court: Well, in that case, all right. I will overrule the objection.

[178] (In open Court:)

(Whereupon, Plaintiff's Exhibit No. 11 for identification was received into evidence.)

By Mr. Burke:

Q. Mr. Lamb, you were very much interested in your earlier days in Communist leaders, were you not, and you wrote quite a bit about some of them? A. In my earliest days and now in my latter days I am interested in all

the world's leaders—all Communists, Socialists, Republicans and Democrats. I am interested in life.

Q. But you especially wrote a book, "Soviet Russia," and a paper on two distinguished Chinese Communist women? A. One of my books was on the nature of planning in the Soviet Union. This was the first planned society, and in 1933 I did write and studied that society and all other societies in the world. I didn't—excuse me.

Q. With reference to the exhibits which were introduced and on which testimony were taken before the Federal Communications Commission, the people about whom you wrote and whose praises you were professing in your writings were such as Lenin, Sun Yat Sen, were they not? A. I would say yes. Sun Yat Sen was the founder of [179] the Chinese Republic and a very great man. I also wrote about Mahatma Ghandi and Nikolai Lenin.

Q. We are talking about the exhibits before the FCC, Mr. Lamb. A. Yes, well, they were a great many thousands of exhibits in that case.

Q. You also wrote about Krupskaya? A. Krupskaya, yes.

Q. I show you Plaintiff's Exhibit No. 12, which is Exhibit 8, Docket 11048, Volume 13 of the exhibits before the FCC and ask you whether or not you were the author of that article, of that publication? A. Yes, I think so. May I take a look at it—my name is on it. I don't have a clear recollection of the article, but it is about two women.

Q. And who were those two women that you were writing about? A. Madame Sun Yat Sen is the widow of the first president of the China Republic.

The Court: When was it that Sun Yat Sen died?

The Witness: I think it was 1924, Your Honor.

I believe it was 1924, and Krupskaya was the widow of Nikolai Lenin, who had founded Soviet Russia. And this [180] was an article—I had met both women, both Madame Sun Yat Sen in Hong Kong, and, I believe that may have been 1933 or 1937; it is going back a long time, but I met

her, and I am really not clear about the year, 1933 or 1937, again, I met Krupskaya, who was the widow of Lenin.

Q. In that writing you stated that Madame Sun Yat Sen said to you that you should work with the Soviet Union, is that true? A. If she said that, I think I correctly reported it. She probably did.

Q. And you wrote some flowery paragraphs about her position? A. Probably so. She was very charming, a charming, intelligent woman and this was Sun Yat Sen's whole philosophy, that the world should come together and that the Soviet Union and China and the United States should be friends, that they had a natural alignment. This is my recollection of what Sun Yat Sen's philosophy was. He was a very great man.

Q. But these were your words, and not Madame Sun Yat Sen's, were they not—"How wonderful it would be to visit the immortal Bolshevik leader during these days of the triumphant progress of socialism in the USSR and who would not sit at the feet of China's first republican president"— [181] and something "to him say 'China work with the Soviets' "?

(Reporter's note: Quotation reads as follows:

> "And who would not sit at the feet of China's first republican president and listen to him say 'China work with the Soviets.' ")

A. Yes, I think this was Sun Yat Sen's whole philosophy.

Mr. Burke: If the Court please, I would like to offer this exhibit.

Mr. Baker: Your Honor, if Mr. Burke is offering this as one of the exhibits in the FCC record, I would have no objection.

Mr. Burke: That is correct.

The Court: Admitted.

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[279] By Mr. Burke:

Q. Mr. Lamb, who was Earnest Thaelmann? A. Who—I beg your pardon?

[280] Q. I say, who was Earnest Thaelmann? A. Oh, Earnest Thaelmann was involved in the Reichstag fire—I believe, whatever the year of that was—19—the late 30's, I think 1939.

Q. Wasn't he a head— A. I believe he was a Communist who was arrested by Goering, or one of the German leaders and thrown in jail and charged with setting a fire to the Reichstag. I think that was the charge. But, anyway, a number of international lawyers were asking me if I would defend him.

Q. Well, wasn't he head of the Communist Party in Germany at that time? A. I don't know if he was-the head—I have forgotten, but I mean it is a long time ago. He was only a name to me, and I never met him or saw him, though—

The Court: Was he a German or a Dutchman?

The Witness: Well, I think he might be thinking of the wrong person, Your Honor. The person who set the Reichstag fire was a young man, a demented young man, and Earnest Thaelmann, I think, was a Communist leader in Germany and he was arrested for something—I have forgotten what it was—but an international lawyers group in France asked if I would take on the defense of his case — [281] whatever the charge was. I don't remember what the charge was.

By Mr. Burke:

Q. As a matter of fact, Mr. Lamb, didn't you write a letter to the German Government, delivered to the German Embassy—

The Court: Just a moment. Is this something that came up in the proceedings before the FCC?

Mr. Burke: Yes, Your Honor, it is one of the exhibits that we have in here.

The Court: Very well.
Mr. Burke: In the official records.

By Mr. Burke:

Q. Didn't you write a letter to the German Government and deliver it to the German Embassy demanding that you be permitted to defend Earnest Thaelmann who was then head of the Communist Party in Germany? A. It is necessary to request the permission of a court to make an appearance for that court. I made such a request that I be permitted to defend him, and I think Arthur Garfield Hayes, who was a very famous civil liberties lawyer in the United States, and a very, very close friend of mine, was also asked to defend Earnest Thaelmann, and [282] whether his request was turned down—I am quite sure that he had made a request and it was turned down—at least my request to defend this person was denied.

Q. I show you, Mr. Lamb, Exhibit No. 94-A of the Federal Communications Commission which was testified to on May 24, 1955 in your case, and I ask you, sir, would you identify that exhibit? A. Yes, sir.

Q. That is a Daily Worker, a Communist newspaper, is it not? A. Yes, sir.

Q. And on the right column of that exhibit, sir, one of the exhibits having been used against you at that hearing —did you not indicate your interest in defending and your efforts to get permission to defend Earnest Thaelmann? A. I guess the short answer is yes. Now, there is a story in this publication about the fact that Earnest Thaelmann would not be permitted an outside lawyer to defend him. But I think Hitler appointed a lawyer for him, but I don't know what became of the case.

Q. And you were that outside lawyer, weren't you? [283] A. Yes, sir, yes.

Q. And does that article show your letter and the reply to it? A. Yes, sir.

Q. Did you say yes, sir? A. Yes, sir.

Q. Now, that is an accurate description of your letter, is it not? A. I don't see my letter in here requesting permission to defend the man—

Q. May I see that—this was the reply that you received from Franz Von Alper that turned you down? A. Yes, sir.

Q. From going to defend Mr. Thaelmann? A. That's correct.

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[433] **Russell Morton Brown**

was called as a witness and, having been first duly sworn, was examined by counsel and testified as follows:

Direct Examination

By Mr. Burke:

Q. Mr. Brown, what is your full name? A. My name is Russell Morton Brown.

Q. And where do you live, Mr. Brown? A. I live in the District of Columbia.

Q. What is your profession or calling? A. I am a lawyer.

Q. Are you a member of the Bar of the District of Columbia? A. Yes, sir, I am.

Q. Are you a member of the Bar of any other jurisdiction? A. I was admitted to the Bar of the District of Columbia in 1937.

I am also a member of the Bar of the Supreme Court of Texas and have been admitted to practice in the [434] United States Supreme Court for the past 25 years, as well as various United States courts in this jurisdiction, like the Court of Claims, Court of Military Appeals, and the other administrative agencies, including the Federal Communication Commission and other agencies.

Q. Are you a graduate of any university or college? A. I have a doctor's degree from Georgetown Law School—Doctor of Jurisprudence.

Before coming to Georgetown I attended Brown University in Providence, Rhode Island, an honor which I share with my counsel, Mr. George Hayes.

I have also taken additional studies in other schools including the George Washington University here and the Graduate School at Georgetown.

Q. How long have you been engaged in the practice of law? A. I was admitted to the District of Columbia Bar in 1937 and I have practiced law ever since that time, first in the United States Department of Justice on the staff of the Attorney General, Homer Cummings, in 1938.

I remained under Attorney General Robert Jackson and had worked with him when he was Solicitor General on the United States Supreme Court cases.

[435] I was assigned in 1940 by the Attorney General to Texas for the conduct of litigation growing out of a controversy between the Federal Government and the States of Texas, Louisiana and California, which became known as the Tidelands Oil Case and involved the question of who owned the oil under the ocean.

They set up drilling rigs on the land and they would slant the drills under the ocean and the question was: "Does the oil belong to the Federal Government, or does it belong to the States?"

We had developed a theory that it should belong to the United States Government. I was responsible for the conduct of some of the phases of this litigation in Texas, and was asked, or assigned by the Attorney General to Texas to conduct a variety of studies involving the acquisition of lands for a Naval station at Corpus Christi, Texas, which involved the oil question because the land was adjoining a very large oil field and was also on the Gulf of Mexico where the question of undersea oil rights came up.

While I was in Texas I did much legal work for the Navy and as the war was approaching, in 1941, the Navy's needs for legal counsel were increasing and I accepted [436] a commission in the Navy in the Office of the Judge

Advocate General of the Navy and entered upon active duty as a Lieutenant, Junior Grade, in the Navy.

I entered active duty as legal officer at the Naval Air Station at Corpus Christi, Texas.

In that capacity I supervised the execution of $125,000,000 worth of contracts and the drafting of those contract instruments together with many, many legal problems that arose from the performance and variations, changes and modifications of those contracts that related to the construction of that Naval air station, and its outlying fields which consisted of areas all over Texas, including the King Ranch and other areas.

I was then transferred by the Judge Advocate General to Washington, D. C. where I acquired by condemnation and negotiation four city blocks in the City of Washington in the area of New Jersey and M Streets, Southwest, or Southeast, for the addition to the Naval Gun factory.

This was an expansion of that facility and I completed that negotiation and the Judge Advocate General then designated me to serve as assistant to the Chief of the Bureau of Yards and Docks as Regional Officer in North Carolina, covering the States of North and South [437] Carolina and part of Virginia and part of Georgia.

My principal responsibility at that station was to acquire approximately 200 square miles of land for the Marine Corps establishment at Camp LeJeune, North Carolina, which is still there and is the largest Marine Corps establishment on the East Coast. And the aviation facility at Cherry Point, North Carolina, known as the Marine Corps Air Station.

I also acquired land for the Marine Corps base at Edenton, North Carolina, and an air base at Elizabeth City, North Carolina, for the Navy.

I conducted negotiations for the acquisition of the Chatham Blanket factory at Winston-Salem, North Carolina, and various establishments at Wilmington, North Carolina, shipyard establishments.

I also negotiated for the purchase and acquisition of land in South Carolina at Georgetown, North Greenville, for aviation facilities and an addition to the Paris Island Marine Corps establishment in Georgia.

Following this I was designated to take charge of the legal matters involved in the Michigan establishment at Grosse Ile, Michigan Naval air station where there were many, many legal problems involved in the bombing sites [438] and the establishment of an area for the use of the aircraft carrier, "The Wolverine," which was functioning in Lake Michigan.

I also handled the legal matters and problems involved in the Naval Air Station at Travers City, Michigan, and I returned to the Judge Advocate General's Office at various times for special duty and report.

Finally, I was designated by the Secretary of the Navy to conduct the defense in a number of general courts martial growing out of the shortage of three or four hundred thousand dollars in a post exchange account matter at the Marine Corps air station at Cherry Point, North Carolina.

I did conduct those defenses under the direction of the Secretary of the Navy.

Following that I returned to the Judge Advocate General's Office in Washington and was returned to inactive duty.

I had entered the Navy from Texas and I returned to Texas where my family was at the time.

I entered upon private practice of law there and I practiced law in Texas, returning to Washington in 1948 after I had been badly hurt in an automobile accident and wanted to be closer to my original location where my [439] mother lived and my brother, up here in the East, and I was invited by some of my old Department of Justice friends to go and work at the Treasury Department.

I was there appointed Chief of the Claims and Litigation Section in the Chief Counsel's office of the Bureau of

Federal Supply, which was the old Procurement Division, the contracting office, for the Treasury Department.

I helped move this facility to the General Services Administration when it was established in 1949.

About that time J. Howard McGrath, whom I had known in Providence, Rhode Island, which was the city of my birth and where I grew up, had come to Washington as, originally as Solicitor General, after being Governor of Rhode Island. He then become a United States Senator, and, finally, was appointed Attorney General.

I had been his personal attorney, and when the affairs of the Department of Justice were being investigated by the so-called Chelf Committee of the House of Representatives, I was in attendance there with Howard McGrath as his counsel, and as his friend, and following that we joined —he wanted to practice law and I had offices and we joined to set up our shop together under the name of McGrath and Brown.

[440] Q. Well, now, could you stop there for just a moment, Mr. Brown. A. Sure.

Q. When you were discharged from the Navy, at what rank did you leave the Navy? A. I was a Lt. Commander.

Q. Now, during your career did you have occasion to write in any periodicals or give any lectures in the legal fields, or did you ever get any citations from any Universities or colleges? A. Well, Mr. Burke, at various times I have taken an interest in writing legal materials.

In 1940, when I was in the Department of Justice, I was one of the authors of a treatise that dealt with the role of labor in wartime.

This was a matter of concern, much concern to the Department of Justice because the coming war made it plain that there would be many problems involved in wartime because of wartime controls which would have to be imposed by Congress. So, I initiated a study which dealt with these problems.

The matter was more than could be completed quickly, and I invited two of my associates to join with [Tr. 441] me, but I had to go to Texas for the Attorney General before it could be completed, and when it finally came out and was published in the Harvard Law Review in 1940 it appeared as the joint work of all three of us.

(Whereupon, a document was marked for identification as Plaintiff's Exhibit 33.)

By Mr. Burke:

Q. I show you Plaintiff's Exhibit 33 and I ask you if you could identify that, please? A. Yes, this is a reproduction of the cover of the Harvard Law Review for November 1940 and this lists the authors who are included.

Q. Who are the other authors? A. The other authors are Samuel Williston, who is a professor of law at Harvard Law School; Edmund M. Morgan, a professor of law at Harvard Law School; Felix Frankfurter, Associate Justice of the United States Supreme Court; George F. Karch, Graduate School of Banking at Rutgers University; Francis Hoage of the Massachusetts Bar; Russell M. Brown and Philip Marcus of the New York Bar—Russell M. Brown is listed as being of the District of Columbia Bar.

Mr. Burke: Your Honor, I would like to offer No. 33. [442] Mr. Baker: No objection.

(Whereupon, Plaintiff's Exhibit 33 for identification was received into evidence.)

By Mr. Burke:

Q. Now, did you at any time lecture at any university? A. Yes, sir.

Q. I see— A. I should say, Mr. Burke, that this article we have introduced is not the only thing I have ever written. I have also written articles in other law journals, but not of such magnitude or of such worth as that one.

I have lectured at times on Supreme Court practice,

principally, which has been a field in which I have had a great deal of experience, and practice, and I have lectured at the George Washington University Law School on that subject.

I was the Law Week lecturer at Toledo University Law School in Toledo, Ohio, and was given a certificate as a Distinguished Law Week Lecturer by that University.

(Whereupon, the certificate referred to was marked for identification as Plaintiff's Exhibit No. 34.)

[443] By Mr. Burke:

Q. I show you Plaintiff's Exhibit 34 for identification and ask you if you can identify that for us? A. Yes, this is a reproduction of the certificate given by the College of Law of the University of Toledo, awarding the certificate of honor to Russell M. Brown in recognition of outstanding service as a Distinguished Law Week Lecturer—1965.

Mr. Burke: I offer Exhibit 34, Your Honor.

(Whereupon, Plaintiff's Exhibit No. 34 for identification was received into evidence.)

By Mr. Burke:

Q. Mr. Brown, would you then tell us how you became associated with General McGrath? A. As I have related, when General McGrath was Attorney General in the Cabinet of President Truman, he was attending Congressional hearings which were looking into various matters which had occurred in the Department of Justice during the Truman administration—while Howard McGrath was Solicitor General and Tom Clark was Attorney General, and then Attorney General Clark was appointed to the Supreme Court and Howard McGrath by that time had been [444] elected to the Senate. He had resigned from the Department of Justice and been elected to the Senate, but at President Truman's request he was asked to serve as Tom Clark's successor in the office of Attorney General, and he did so.

I was his personal attorney at the time and was familiar with his various business interests, particularly those relating to real estate and finance and, after the conclusion of the Congressional hearings, he wanted to practice law and I had offices in the Southern Building and had space where he could easily be accommodated and we agreed to share that space.

Q. When was this, Mr. Brown? A. This was in 1952, Mr. Burke.

Q. Was that when he resigned as United States Attorney General? A. Yes, sir, yes, sir.

(Whereupon, Plaintiff's Exhibit No. 35 was marked for identification.)

By Mr. Burke:

Q. At the time that he and you became associated, did you and he enter into a written agreement setting forth your relationship? A. Yes, we did.

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Testimony of Mrs. Sunne Miller

[Tr. 551] Whereupon SUNNE MILLER was called as a witness for the plaintiff and, having been first duly sworn, was examined by counsel and testified as follows:

Direct Examination

By Mr. Burke:

Q. Mrs. Miller, would you state your full name? A. My name is Sunne Miller.

Q. How do you spell that "Sunne"? A. S U N N E.

Q. Where do you live, Mrs. Miller? A. 5321 South Main Street, Sylvania, Ohio.

Q. You said Sylvania—is that a suburb of Toledo, Ohio? A. Yes, sir.

Q. And in what profession or calling are you engaged? A. I am associated with a public relations and advertising firm.

Q. Now I direct your attention to the years 1952, 1953, 1954 and 1955—where were you employed at that time? [Tr. 552] A. I was manager of radio station WTOD in Toledo, Ohio.

Q. And who was the owner of that station? A. Unity Corporation.

Q. I am sorry— A. Unity Corporation.

Q. Who was the head of that corporation? A. Well—Edward Lamb.

* * * * * * * * * *

Q. Edward Lamb—is that the gentleman who is sitting here? A. Yes, sir.

Q. Now would I be correct in saying then that you were employed under his supervision? A. Yes.

Q. Now did there come a time, Mrs. Miller,—well I will ask you this: What did your duties require you to do? A. Well, I was manager of the radio station which would mean that I planned the programming and directed the sales of the organization.

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[Tr. 554] Q. May I ask you this: Did there come a time when you met General McGrath? A. I met General McGrath prior to coming to Washington.

Q. And when was that—on what occasion was that? A. Well I would think it was at the beginning—I forget, but I would say at the beginning of 1954 when there was a party given in Mr. Lamb's offices for General McGrath and Mrs. McGrath.

Q. Was Mr. Brown there? A. No.

Q. Now, did there come a time when you came back to Washington then?

Did you hear my question, Mrs. Miller? A. I don't believe so.

Q. I say, did there come a time when you came to Washington? A. I came to Washington numerous times because we were engaged in other television hearings as well.

Q. I mean in connection with the Federal Communica- [Tr. 555] tions Commission hearing on station WICU-TV? A. Well you wish me to be specific—I came on that particular matter and I also came for the purpose of formulating plans for an application to the Federal Communications Commission for the acquisition of a station on channel 11.

Q. But can you tell us when was the first time you came to Washington for the purpose of helping in the preparation of the WICU-TV case? A. I would say that would be in the Fall—in September of 1954.

Q. At that time did you have conversations with or instructions from Mr. Lamb? A. Well, prior to my departure for Washington and the FCC case was to begin in a few days, I had some personal files on witnesses that I had looked up and I was, Mr. Lamb told me that I was to go to Washington and go to Mr. McGrath's office and discuss the case with Russell Brown.

Q. Did he tell you anything else in connection with your relationship with Russell Brown? A. He told me that he wanted Mr. Brown to try the case, he had discussed it with him, about this previously, [Tr. 556] and Mr. Brown struck him as being a very aggressive and knowledgeable lawyer.

Q. Now following these instructions, did you come to Washington? A. Yes, sir.

Q. And you brought all of your materials with you? A. Yes, sir.

Q. Mrs. Miller—the hearing commenced on the 15th of September 1954—did you arrive before the commencement of the hearing? A. Yes, I did.

Q. And how long did you remain in Washington? A. At that particular time?

Q. Well—throughout the hearing period? A. I was there practically the entire hearing period—until it concluded, I believe, at the end of May, 1955.

Q. Now during that period of time, were you in attendance

at the Federal Communications Commission during the course of the hearing? A. Practically every day.

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[Tr. 579] Q. Mrs. Miller, the hearing was terminated I think you have testified at the end of May, 1955, were you present, either before or after that time, when any further discussions were held by Mr. Lamb or Mr. McGrath about the matter of Mr. Brown's fees? A. I discussed it with General McGrath on numerous occasions.

Q. And can you give me the dates of some of those discussions? A. Well, there was a discussion after the case ended—I would think it would be during the time that the brief was being filed—probably in June, or maybe July, something was being prepared, and Mr. Brown was very dissatisfied and he, General McGrath, asked me to calm him down—

Mr. Baker: If the Court please, I object to any conversation there may have been between these parties without the presence of Mr. Lamb.

Mr. Burke: Well Your Honor, General McGrath was an officer and chief counsel of this company—

The Court: I didn't know that he was personal counsel for Mr. Lamb, however.

[580] Mr. Burke: Well Your Honor, we spent days in developing that he was personal counsel for Mr. Lamb—he was general counsel and—

The Court: I thought he was counsel for two of these companies.

Mr. Burke: He was general counsel for two of the companies, that is right, and counsel for Mr. Lamb and one of the defendants in this case is the very company we are suing and we have shown this by official records that he was vice president and general counsel—

The Court: Who was present at the time of this discussion please?

The Witness: General McGrath—Vincent Gaughan and myself.

The Court: Just the three of you?
The Witness: Yes.
The Court: Will counsel come to the bench, please?

(Whereupon the witness stepped down and there was held the following Bench conference):

The Court: How long do you expect her to be on the stand?
Mr. Burke: Oh not very long, because she must get [581] back tonight.
The Court: I had expected to adjourn at three-thirty this afternoon, so I was kind of concerned—I have an appointment at four o'clock.
Mr. Burke: May I suggest this to Your Honor—
The Court: I could cancel my appointment if it would help.
Mr. Burke: I will try to complete very quickly Your Honor.
The Court: I would be glad to, if it would accommodate you. I just wanted to make sure.
Now what is your position, Mr. Baker?
Mr. Baker: I object to anything pertaining to Russell Brown or compensation in a conversation between McGrath, this other man and herself, when Mr. Lamb wasn't there.
That is the basis of my objection.
She has started to testify as to what the conversation was and that is the basis of it—she is testifying to a conversaion when he was not present.
The Court: She said that—if I recall—that McGrath was present and she was present, and who else?
[582] Mr. Baker: Gaughan.
Mr. Burke: Vincent Gaughan.
Mr. Hayes: I was about to say that Mr. K (Lamb) has himself testified that Mr. McGrath—General McGrath—was his counsel, Your Honor.
Mr. Burke: Yes, his personal counsel.
Mr. Hayes: And he represented him in Dispatch Inc. and various matters.

The Court: Well I understood he was his attorney in connection with this particular company, but I didn't know that he was involved with all these things—

Mr. Burke: He said he represented him in Airways and that he was his attorney—

Mr. Baker: But that was in a corporate capacity.

Mr. Burke: Oh no.

Mr. Baker: That was all.

Mr. Burke: He said he was his personal counsel and we would be glad to look that up for Your Honor—

Mr. Hayes: And this is something that has to do with this particular case.

The Court: Yes, but the point about it is that Mr. Lamb wasn't there.

[584] Mr. Burke: Well Mr. Lamb was represented by his counsel and vice president which we claim creates the same situation as if he were there.

The Court: I don't believe that Mr. McGrath's authority would extend to his making a personal statement on behalf of Mr. Lamb.

Mr. Burke: As executive vice president?

The Court: No.

Mr. Burke: And personal counsel, Your Honor?

The Court: No. I don't think so.

Mr. Burke: Well, Your Honor, surely the officer of a corporation can make a statement on behalf of the corporation and—

The Court: Well, I don't think that an attorney for a corporation is necessarily empowered to go around making statements for it.

Mr. Hayes: He was chief attorney and he was also vice-president.

Mr. Burke: Vice president, and McGrath told him not to worry, that is—he was going to be paid and Lamb said he would take care of it.

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[Tr. 585] By Mr. Burke:

Mrs. Miller, you have testified that you had several conversations with General McGrath concerning Mr. Brown's fee and I asked you if you could give the date of those and you said some time either in June or July when the final briefs were written—I think you meant findings of fact and conclusions of law. A. Well I don't know exactly what term it is.

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Q. Now what was said at that time concerning [Tr. 586] Mr. Brown's compensation or fee? A. Well, General McGrath and I were very good friends and General McGrath asked me if I would talk to Russell Brown about his claims for fees, that the case was not really completed and that Mr. Brown was very restive and very upset because he hadn't been, I suppose that the expression is "taken care of"—he had not received his legal compensation for the case and he had spent a year and a half on it, and the General asked me to speak to Mr. Brown and say to him "Just wait until things were settled."

Q. All right—what was the next occasion when you spoke to either General McGrath or Mr. Lamb or both concerning Mr. Brown's fees? A. I don't think I ever really discussed it at any length with Mr. Lamb, at any time. I discussed it with General McGrath practically every time I came to Washington, because I went to visit him.

Q. Did there come a time when you were in Washington in 1959? A. I was in Washington several times in 1959.

Q. And was there an occasion when you were in Washington in 1959 when you had a meeting with General [Tr. 587] McGrath and or Mr. Brown? A. Yes.

Q. And when Mr. Brown was there that question was raised? A. I was at the General's home with Mr. Brown.

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By Mr. Burke:

Q. And at that meeting with General McGrath and Mr. Brown in 1959 when you say you were staying at General McGrath's or you met at General McGrath's home, what if anything was said by General McGrath concerning Mr. Brown's fee? [Tr. 588] A. The General said that Mr. Lamb will take care of everything and Mr. Brown had been, I believe had filed suit in Toledo—at least I know he had been in Toledo and as to what the time of the filing of the suit in Toledo was I do not know—or do not recall, but he said "If you will stop filing suits everything will be all right."

Q. And about when in 1959 was that? A. It would be at Easter time.

Q. Now do you recall another occasion in 1960 when you talked with General McGrath? A. I came back to some advertising conference at that time and I talked to the General again.

Q. By the way—in what capacity were you attending that convention? A. I was president of the Advertising Club.

Q. I see.

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[Tr. 590] By Mr. Burke:

Q. Now Mrs. Miller, when you are talking about withholding suit, did you have any relationship to that suit in the District of Columbia? A. Well, I was present when General McGrath asked Mr. Brown not to file suits in the District and not [Tr. 591] to file them anywhere.

Q. When was this? A. This was I would say around Easter time of 1960.

Q. In 1960? A. Yes.

Q. Now when he asked him not to file any suits what if anything did he say about Mr. Brown's fee? A. He said he would be taken care of.

Q. By whom? A. By Mr. Lamb.

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[Tr. 611] The Court: Very well.

Mr. Burke, I am getting a little bit concerned about the length of the time that you all are taking. It seems to me that you are having a lot of duplication in your examination and this way we are going to be here until Christmas. Mr. Brown goes over and over and over the same thing.

Mr. Burke: Well, he hasn't testified to any of this as yet, Your Honor, and we do have to put in certain things in order to establish our case. But I will say this, Your Honor, it won't take much longer with Mr. Brown.

Mr. Hayes: It won't take until Christmas.

Mr. Burke: Oh, no.

The Court: Well, I think you ought to put questions to him and try to get him to stick to the answers to those questions, because he roams all over the place.

[Tr. 612] Mr. Burke: Well, Your Honor, I was going to say as soon as we are through with him we do not expect our remaining witnesses to take more than 10 minutes to half an hour each, so we should be getting along much more quickly.

The Court: Very well.

(In open Court:)

By Mr. Burke:

Q. Now, I show you Plaintiff's Exhibit No. 6, Mr. Brown, and restricting it to the photocopy, I ask you to read that and explain what was the focal charge in that exhibit. A. Mr. Burke, the entire book was in issue, but—

The Court: Now, just a moment. Do you wish him to read it to himself or to the jury?

Mr. Burke: To the jury, that one paragraph.

The Court: Yes, you may do that.

The Witness: But this particular language was the focus of the matter before the Commission.

On page 190 of this book it reads:

"If the American planned economy is to be achieved it becomes evident that those who produce, the workers and farmers, and those who defend—that is, the militiamen—through joint action and organization, shortly must [Tr. 613] assume title to the means of production.

"Have the masses acquired a degree of enlightenment sufficient to overthrow the historical but outworn theological, Communistic, social and economic dogmas? Capitalists and economists are becoming doubtful of their premises. Socialists are accused of playing into the hands of the Fascists. Many American Communists have been in a self-destructive struggle for leadership.

"Soviet Russia's economic planning challenges the rest of the world as an alternative. Its experiments begin to arouse America. It is time to realize that the chart of human destiny justifies the most searching inquiry into the accomplishments of the one existent socialist state."

Q. Now, what was the connotation or the meaning that the Broadcast Bureau, through its counsel, suggested that this represented in the charge placed against Mr. Lamb?

Mr. Baker: If the Court please, the document speaks for itself. Mr. Brown has read it to the jury and any inference I would object to.

[Tr. 614] The Court: The objection is sustained.

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[817] Q. Now, let me turn over to you Exhibits 32 through (j) so that you can recall your correspondence with him, and would you tell the Court and jury what transpired between you and him during the course of your negotiations. A. Well, I sent Mr. Lamb the bills on June the 18th and he returned them to me on June the 24th.

He said that he had always done business with Howard McGrath and even though I may have had a part in the hearing, he said again that he made payments exceeding $170,000 to the law firm of McGrath and Brown, so he sent my bills back.

Then on June the 25th I sent the bills back to him and I said: "You had better keep these," and I recited what

the relationship was and I said: "Your statement that payments exceeding $170,000 have been made to the law firm of McGrath and Brown is not true. I don't know how much you paid General McGrath for his personal services, but you [Tr. 818] have no right to conclude that what you paid him was to be divided with me. Please send me the dates and amounts and sources of any payments and the items for which they were made."

I never got a reply to that.

Then, on July the 2nd, a week later, I wrote him and I said: "I have talked with General McGrath" and he says he had talked with Mr. Lamb and Mr. Lamb said he felt that my bill was too high.

I said: "Well, all right—I will talk about it—we can discuss it. It is a tax deduction and I can arrange for you to pay it over a period of years."

I didn't get any answer to that.

On August the 1st, a month later, I wrote him again and I said: "I wrote you a month ago saying Howard McGrath had told me you said my bills were too high and I asked you to give me your ideas. I haven't heard anything from you.

"As you will recall, I suggested when you and Howard and I talked it over at the Mayflower here we should submit the matter for arbitration, and you would appoint [Tr. 819] one person and I would appoint another and that both would select a third and we would fix a fee after hearing from both sides. I am raising this for you consideration as a quick and easy way of fair procedure."

Well, Mr. Lamb didn't answer that.

On November the 4th I wrote to him again and I said: "We have had some discussion and some correspondence regarding payment for my legal services, and we haven't agreed on a figure and you haven't told me what you think at all.

"I have written you twice and I have offered to arbitrate. This is to tell you I am going to take legal action unless we can reach an agreement.

"This is to let you know I don't regard any payments made by Airway Electric Company or Airway Industries as available to you for credit."

He answered me on November the 7th—

The Court: Is this in 1957?

The Witness: Yes, Your Honor.

The Court: Thank you.

The Witness: And he said: "Thank you for your letter of November the 4th. I am sending a copy to [Tr. 820] General McGrath. I discussed this with General McGrath and he will discuss it with you. He is in the hospital and you may not have been able to see him—Ed Lamb."

Then on November the 13th—oh, I beg your pardon, on October the 27th I wrote him again and I said: "I have refrained from taking any action to collect the fee because I hoped we could work things out on a friendly basis, but there is no point in further delay and I am going to go ahead. I would like to avoid it—you can pay this on a monthly basis. It is tax deductible."

I said: "Surely, Ted, a fair review of the services I performed as your trial counsel, the manner in which they were performed and the value of the results obtained, will show this to be a very reasonable and sensible solution to the problem."

I said: "I am not going to wait—"

Well, I said I would wait briefly to hear from him and then I will have to go ahead.

Then I had this letter from Mr. Lamb in which he says:

> "Thank you for your letter in which you say you are delaying hoping we can work things [Tr. 821] out on a friendly basis. I don't want to hold you up, but I told you I would meet with General McGrath and I have also told you I will be glad to talk about this when I am in Washington. I don't have any objection to your coming to Toledo. I don't want to delay disposition of the matter, but I don't get to Washington as often as I would like."

Then I wrote to him on November the 13th and I stated:

"Dear Ted:

"Please give me a definite date when you will be in Washington to discuss the question of my compensation. I would like for Howard McGrath to be present so that we can discuss it together.

No answer.

Then I wrote him on December the 17th and said:

"Dear Ted:

"Sorry we couldn't get together when I was in Toledo last week. I feel if you and I could sit down together without intermediaries we would [Tr. 822] be able to work out our differences."

No, this was 1962—I beg your pardon. This is much later.

But the correspondence, the last correspondence in this is November the 13th, 1958, when I said:

"Give me a date when you will be in Washington to discuss my bills."

Didn't get any answer.

Now, as far as these exhibits are concerned, I wrote in December of 1962 and said:

"Sorry we couldn't get together when I was in Toledo last week. I feel that if we could sit down without intermediaries we could work things out. If you feel disposed to approach the matter on this basis, I will be glad to meet with you."

Then Mr. Lamb wrote to me and said:

"I'd be glad to meet with you any time. I think it would be just as well to avoid further expenses in this matter provided we meet without prejudice. I am going on a skiing trip out west for a couple of weeks.

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[Tr. 823] I said: "What do you mean, you paid out $170,000?"

I said: "That includes the money of Airway Electric."

I said: That is not part of the FCC hearing at all under any circumstances."

He answered saying it all came out of the same pocket.

He said: "I had to get this money wherever I could. If I could have gotten it out of Seiberling, I [Tr. 824] would have gotten it there."

I said: "Well, look, Ted—these Airway stockholders don't owe me any money. I didn't work for them."

He said: "Now, look, I have an understanding about that."

And he said: "Howard McGrath got the money. We ought to talk with him."

I said: "Look, I have talked with him every time I have seen him, and I know what Howard's position is."

He said: "Well, I'd like to be there."

And he said: "Look, I have this Blou suit pending against me in New York."

He said: "Howard is going to be there on January the 19th—we have a meeting set up at the Roosevelt Hotel. Howard's going to be there and Irving Mariash is going to be there."

Mr. Mariash had been acting as Mr. Lamb's attorney in the Blau suit.

I said: "Well, do you think it will help to resolve this matter—if you do, I will be glad to join you there."

Mr. Lamb got on the telephone and placed a call [Tr. 825] to Washington, D. C., to J. Howard McGrath. He didn't tell him that Mr. Gaughan and I were in his office, but he confirmed the appointment which he had for January the 19th at the Roosevelt Hotel in New York.

Q. Now, this was the year 1959? A. Yes, sir.

Q. Now, continue. A. Mr. Lamb then turned away from the telephone and he said: "Now, if you will come up," he said, "we will have a chance to discuss the entire matter."

Mr. Gaughan was then claiming Howard McGrath owed him some money—

Mr. Baker: If the Court please, I don't know what this has to do with the issue here.

The Court: The objection is sustained with reference to Mr. Gaughan.

The Witness: We agreed to meet Mr. Lamb in New York on January the 19th at the Roosevelt Hotel.

By Mr. Burke:

Q. Mr. Brown, at this point you had received no compensation whatsoever other than reimbursement for certain expenses in connection with WICU-TV, the case that you had [Tr. 826] handled for over three years? A. No, sir.

Q. And up to this moment, then, you had received no compensation whatsoever for your representation of Mr. Lamb and his company in that case? A. I have received no pay from him or Dispatch, Incorporated, at all.

General McGrath personally gave me an advance of $1,000 on one occasion on account of fee.

Q. Was that in connection with money you had put out? A. Well, it was called an advance of fees and that is the way I let it go.

I didn't—well, I had been investing my own money in the expenses that were put out on this case and then as Mr. Lamb repaid the office by these checks that he would send to McGrath and Brown, I was getting repaid for some of the expenses.

The Court: When did you get this $1,000 from Mr. McGrath?

The Witness: My recollection, Your Honor, is it [Tr. 827] was about the time I was devoting a great deal of time to the preparation of the final documents before the Federal Communications Commission, which is before the Examiner's consideration began, and I would say it was just before October 1955, or in that period.

By Mr. Burke:

Q. Now, Mr. Brown, I would direct your attention to the door of the suite where you and general McGrath maintained your offices.

Did there come a time when the name "Dispatch, Inc." was put on that door? A. Well, Mr. Burke, I have heard it said that that was true, but I don't have any knowledge of that, and I don't believe it is true.

Q. You are not aware of that? A. I don't believe it.

Q. Do you know when General McGrath discontinued to be executive vice president of Dispatch, Inc.? A. I believe that his connection with Dispatch, Inc., ceased at the end of 1957.

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[Tr. 831] The Court: The trouble with Mr. Brown is that his answers are very often unresponsive. He just takes the rein and runs with it, and Mr. Baker really is very indulgent with—for the most part and lets him do it.

Mr. Burke: Well, Mr. Lamb does the same thing, Your Honor, and he brought the statements in about this [Tr. 832] meeting.

The Court: Well, at least Mr. Lamb has not been on the stand saying the same thing over and over and over, and Mr. Brown has been repeating many of these things over and over again. I still think we are taking an awful long time on this.

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[Tr. 840] **Testimony of Russell Morton Brown**

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He went out and I told Mr. Lamb I was going to initiate my own suit against him in the District of Columbia unless he could make up his mind to pay my bill.

Q. And what did he say to you then? A. Mr. Lamb then said: "Look, I have got enough lawsuits on my hand," he said, "this Blau suit is terrible."

He said: "This Blou suit is very bad—they are claiming a couple of million dollars, or over 2 million dollars that they say I made on the stock of this company—"

Mr. Baker: If the Court please, we are again getting into collateral issue that has no bearing on this case, and I object to it.

The Court: The objection is sustained.

Mr. Burke: Your Honor, may we discuss that?

The Court: No, not about this statement that he [Tr. 841] made.

Mr. Burke: Well, Your Honor—

The Court: You may come to the bench, but this statement is stricken and the jury will disregard it.

(At the Bench:)

Mr. Burke: Your Honor, we have an affidavit in support of our objections to the motion for summary judgment which was filed by them, and we said specifically that he was involved in this Blau suit which has to do with a breach of trust—

The Court: I am familiar with your claim.

Mr. Burke: Right. And that he specifically said that he didn't want any adverse publicity and he didn't want any suits and this is the very crux of the part of our case that we are now engaged on.

Now, how can we relate that if Your Honor will not allow us to bring in this suit?

The Court: I have no objection to your relating about it, but he continually brings in these large sums of money, which he claims are involved.

Mr. Burke: Well, Your Honor, this involved two [Tr. 842] million dollars.

The Court: I don't think he is an appraiser of these matters.

Mr. Burke: He's not an appraiser, but it was a suit for two million dollars, Your Honor.

Mr. Garrigan: If the Court please, if we are going into this particular area, I think it is only fair that we discuss the entirety of the Blau suit which took a period of over three years, and finally resulted in Mr. Lamb being acquitted of all charges. Now, this is going to go on and on, and we have been sued here for bills submitted in June of 1957, or January of 1957, and the Blau suit is completely irrelevant, and I know that Mr. Brown would agree to that.

Mr. Hayes: If Your Honor please, this is one of the issues and there is a question of the statute of limitations.

The Court: I know that. I am aware of that.

Mr. Hayes: Well, then, don't we have an opportunity of showing the things that surrounded it?

The Court: You certainly do, and I am trying to

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[Tr. 843] Mr. Brown, when we were interrupted you were [Tr. 844] telling us that Mr. Lamb said something to you about the Blau case. What was that, again, sir? A. Yes, he said the Blau case was a claim that was very distressing to him and involved a lot of money. He claimed that he had made over two million dollars in respect to his profits in trading on the stock exchange—

Q. No, don't tell us the amount. Just the subject of the discussion. A. Trading in the stock, that he didn't want any more lawsuits, especially he didn't feel he could stand the publicity because he was engaged in the struggle for the control of the Seiberling Rubber Company and that was listed on the New York Stock Exchange, and he said: "If you will just withhold your action, please," he said, "I will get straight with you."

He said: "You know, Howard has always been my lawyer and you and Howard are in touch. I will work it out with you through Howard and I will be very reasonable with you."

And he said: "But I don't want any more lawsuits [Tr. 845] now and I have to ask you please, don't bring a suit in the District of Columbia especially."

Q. Now, then, did you part on that note? A. Well, I didn't make any promises, but we talked some about other things, and Howard McGrath, and about keeping in touch with Howard and he said: "I am going away on a skiing trip again," and for me to keep in touch with Howard McGrath and I said: "I always do—I will."

Q. Subsequent to that was there any other effort made to talk about payment of your fee? A. Mr. Burke, I talked with Howard McGrath about this subject and he told me he was in touch with Mr. Lamb and one thing that Mr. Lamb did say when we were there in New York, which

Howard McGrath also repeated, was that the FCC case had been extremely expensive and he said it had cost him a lot of money, and that it was taking a lot of money to build the station back up, that he had to have time—he needed time.

Howard McGrath repeated this to me after that January 1959 meeting, and Easter of 1959, particularly. I did go down to General McGrath's house with Sunne Miller when she was in Washington, and we talked with him generally [Tr. 846] about a wide variety of things including this, and he said that he was very hopeful that Mr. Lamb would be back on his feet and able to take care of this bill, not only for me but for General McGrath himself, in the near future, because Mr. Lamb was tied up with Seiberling and was in several other things and he just needed time.

Q. Actually, Mr. Brown, up to this point as is shown on this board, neither you nor General McGrath had received any money in connection with the WICU-TV case? A. Well, at that time, Mr. Burke, I really must confess I didn't know about General McGrath's arrangements.

Q. But since then you have acquired the knowledge? A. Yes, since then I have acquired the knowledge which is reflected on the blackboard, but I talked with General McGrath several times. I was handling some legal matters for him and we discussed it and I am particularly mindful of the date, at least in 1960 when I was in General McGrath's home and Sunne Miller was here and she came on an advertising woman's convention of some kind, I think, and we were at General McGrath's residence and there was some kind of conversation that took place in [Tr. 847] June of 1960. I had lunch with Howard McGrath—

Q. What part of June? A. This was early in June, Mr. Burke; I would say the first week in June, and the General and I were talking about—

Mr. Baker: Excuse me, but was Mr. Lamb there at that time, Mr. Brown?

The Witness: No, he was not.

Mr. Baker: Then I would object, if the court please.

Mr. Burke: Well, he has testified, Your Honor, that Mr. Lamb had told him that Mr. McGrath was his lawyer and to discuss the matter with Mr. McGrath in his behalf and he had been following his directions.

The Court: Very well.

The Witness: General McGrath and I had lunch at the Mayflower Hotel and I told the General I was through waiting—I just couldn't wait any longer.

After lunch we were walking back to his office, towards his office, and he asked me to come upstairs with him and I did.

[Tr. 848] He said he wanted to call Mr. Lamb.

He placed a call to Mr. Lamb in Toledo and he told him about our lunch conference and that I was going to go ahead and file suit in the District of Columbia.

I didn't hear Mr. Lamb's end of the conversation, of course, but General McGrath gave me the telephone, after explaining—I heard him say on the telephone what I had told him, and then I got on the telephone and I spoke to Mr. Lamb and he said, he was very friendly, and he said "I just don't want you to file a lawsuit now, Russ" he said. I am right in the midst of several important business matters. The Seiberling matter is taking a lot of money—it is taking all the money I can manage to raise. I am involved in that Blau suit in New York and it is not going too well. The Erie station is coming back nicely but it's going to take some time to build up."

He said, "I need time and I will get straight with you but I want you please to delay any lawsuit."

He said, "I mean, you and I should not have any lawsuits. I will never forget what you did for me." He said, "I know you are the one that I owe my good results to."

He said "You really saved the day for me, and if you will just give me time, I am sure that you and I will be [Tr. 849] able to compose our differences.—We will be able to settle very satisfactorily if you will just give me time to get my affairs in shape."

He said, "You know, I went through a terrible time in the FCC hearing and it has taken me a long time to get

straightened out, and then I got involved in this Blau suit while the hearing was going on, and now I am in the Seiberling take-over."

He said "If you will just give me time and not file a suit," he said, "we don't need any more lawsuits—that is not the way to do things." He said "We all lose money that way."

And he said "We ought to save the expenses and settle our differences—now will you do that please?" He said "You are there with Howard and you know Howard has always been my lawyer, and you have confidence in Howard and I want you to have confidence in me."

I said "Well I will talk it over with Howard." and I hung up.

I then talked with Howard McGrath and he assured me that he had absolute confidence in Mr. Lamb's sincerity, and he said that Mr. Lamb had always been extravagantly lavish in his praise of the work I had done for him, and that he was certainly eager to pay me but he just needed [Tr. 850] time, so I agreed to delay the filing of the lawsuit on that basis.

Q. Now this was in the first week of June 1960? A. That is my recollection Mr. Burke.

Q. Now having deferred any filing of a suit did there come a time when you had further correspondence with him? A. Yes—I have—I may have left that on the desk.

Mr. Burke, I have to tell you that General McGrath pointed out and Mr. Lamb pointed out that he had never denied owing me any money—

Mr. Baker: If the Court please, that is a voluntary statement—there was no question as to that.

The Court: Would the Reporter read the question.

(Whereupon the Reporter read back the last question)

The Witness: Yes, sir.

The Court: The last statement of the witness is stricken and the Jury will disregard it.

By Mr. Burke:

Q. And what was that sir? A. On December 17, 1962 I wrote him from Washington and said I was sorry I missed him when I was in Toledo last week—"I think if you and I could sit down without intermediaries we could work out our [Tr. 851] differences. If you want to discuss the matter on that basis I will meet you at any time and place, without prejudice, and this is fully satisfactory to Gene Farber and to my own lawyer."

Q. Did you get any reply to that? A. I got a reply dated December 26, 1962, which Mr. Lamb wrote saying: "Thank you for your letter. I don't have any objection to meeting with you as long as it is without prejudice to our future relationships. I think it is just as well to avoid further expenses in this matter." He said: "I am in and out of the city and I am leaving on a skiing trip to the west coast for a couple of weeks—maybe upon my return we can work out some kind of a schedule."

I never heard any more from him.

Q. Meanwhile, Mr. Brown, taking you back to 1959—did there come a time when you filed suit in Ohio? A. Yes.

Q. And do you recall when that was? A. That was in the Spring of 1959—in April.

Q. And what happened to that suit? [Tr. 852] A. This suit is still pending in Ohio.

Q. Was there any conversation or any understanding relative to the suspension of activities in that suit?

Mr. Baker: Excuse me—understanding with whom?

Mr. Burke: With Mr. Lamb or his counsel.

The Witness: After I had filed that suit, General McGrath called me and he said that this was very bad for Mr. Lamb and he was sorry I had filed the suit. Some time went by and the matter was not moving ahead and General McGrath talked with me and asked me if I would please take no steps to bring it to trial, because he was sure that Mr. Lamb would make a serious and sincere effort to settle my claim for legal services.—He particularly said that it

would be undesirable to have a suit filed in the District of Columbia, and that if we would just let the suit stay there in the status quo out there in Toledo, he would be very grateful, and that Mr. Lamb would make settlement arrangements at his first opportunity.

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[Tr. 853] By Mr. Burke:

Q. Did you at the time that you filed this suit in the District of Columbia—or rather were you at that time faced with any impediments in connection with prosecuting the same suit in Ohio? A. Yes—all of these records which are on the table are in the custody, the legal custody, of the Federal Communications Commission here and I had no way to get them out there in Ohio to use in the conduct of the case.

Not only that, but at the time, the witnesses who knew most about the case were here—that is, J. Howard McGrath, Mr. Jim McInerney, and the people at the FCC who know who had tried the case and knew all about what my part of it had been and what the importance of it was.

So the natural place to conduct the suit was in the District of Columbia and not out there in Ohio.

[Tr. 854] Q. Well now, after December of 1962 when you had your last correspondence, I believe, with Mr. Lamb —did there come a time when you realized that you were not going to get paid unless you proceeded with that suit? A. Well that was very plain Mr. Burke—and I came to that conclusion because General McGrath had talked with Mr. Lamb and no results had ever come from any of those conversations.

He couldn't tell me when anything was going to be done.

Q. Did there come a time when you had a meeting with General McGrath and advised him that you were going to go ahead with your suit? A. Yes—what happened was that Mr. Lamb came to town actually to give a party for the publication of his book—"No Lamb for Slaughter"—

and General McGrath was going to be a guest at that party, I think, and this was in May of 1963.

Q. I see.

* * * * * * * * * *

[Tr. 856] The Witness: I told General McGrath that I was going to proceed with the suit.

Mr. Burke: I would ask the Court to take judicial notice of the date of the suit—I have the file here, Your Honor.

The Court: The date of the filing is May 21, 1963.

* * * * * * * * * *

Testimony of Milton Heller, Attorney

[Tr. 983] The Witness: Well, a senior partner, handling a [Tr. 984] case, would charge a hundred dollars an hour for his time. Therefore, I would say for three thousand hours I would say the minimum that would be charged in this particular case would be three hundred thousand dollars.

Then, depending upon the economic benefit to the client, in this particular case there was an obvious tremendous economic benefit and I would say the charge could range much higher, depending on all the factors, that I have stated and that you have stated, would be I would say anywhere from three hundred thousand dollars to seven hundred thousand dollars.

* * * * * * * * * *

Testimony of Joseph Leo McGroary, Attorney

[Tr. 998] A. He did this—he said "Joe, in that case I put in about three thousand hours of work." He said that he had felt that he had forestalled or avoided a possible criminal prosecution of his client, he indicated that he had saved for the client a station which was, or a license which was the subject matter of the controversy and that the client would not pay him and he had to sue him.

Q. And did he mention the amount of the suit? A. Sir I am not sure—if I gave a figure of five hundred thousand dollars then he mentioned the amount of the suit.

* * * * * * * * * *

[Tr. 1129] By Mr. Burke:

Q. That is not my question. I am asking you whether or not you are aware, or knew, that he was going to see Senator McCarthy for you? A. I, at that time, I knew that they were friends, of course, and I learned later that he did see Senator McCarthy several times over several years.

Q. Wasn't that one of your problems, Mr. Lamb, as to whether the McCarthy Committee was going to investigate you? A. Well, I am not able to say that we knew then, or know now what our problems were.

Senator McCarthy was very active and aggressive in those days.

Q. Is it not a fact that Commissioner Doerfer, who was chairman of the Federal Communications Commission—A. He was later, yes.

Q. Was a protege of Senator McCarthy? A. Yes, that's correct.

Q. And wasn't that one of the reasons you wanted General McGrath to see Senator McCarthy? [Tr. 1130] A. Well, we didn't know, and we don't know, what the relation was specifically between Mr. Doerfer or anyone else, including Senator McCarthy. We both come from the State of Wisconsin—we knew that.

Q. Well, did you understand that General McGrath would see Senator McCarthy? A. I am sure that among the different people that he said he would talk to, or would consider talking to, was Senator McCarthy. Senator Magnuson, too, was a very influential person at that time.

Q. And General McGrath did see Senator McCarthy, did he not? I am sure that he saw him any one of several times—

Q. Well, let me ask you this specific question.

Before you paid him that $5,000, did he see Senator McCarthy before? A. Did he see Senator McCarthy before?

Q. Yes, before you paid him that check? A. I do not think so. I do not think so. no.

The Court: Mr. Burke, didn't you exhaust this subject previously? It seems to me that you spent a lot of [Tr. 1131] time asking him about this same subject.

Mr. Burke: I did, Your Honor, but we called him in the first place because we needed to do so in order to establish our case, and now—

The Court: Well, you kept him on the stand for a long period of time, and it seems to me that you have gone into all of this before, and this is just repetition of something you went into at great length the other day.

Mr. Burke: Well, as I recall it, when he was testifying this morning he denied, I thought, that he had engaged or attempted to talk with General McGrath about Senator McCarthy, or seeing Senator McCarthy, and I just wanted to bring out the facts, because I think it is rather important, Your Honor, because we have evidence that he talked to Senator McCarthy.

Excerpt From Court's Instructions

* * * * * * * * * *

[Tr. 1310] When, as here, a person sues for compensation for services, and a suit was not brought within the limitation period, then that person has the burden of proving something that will take the case out of the Statute of Limitations, or something that will estop the defendant from setting up a defense of the Statutes of Limitations according to the legal principles which I have endeavored to explain.

So, in this case, Mr. Brown, the plaintiff, has the burden of proving to the jury by a preponderance of the evidence, that is, by the greater weight of the evidence, that after the Statute of Limitations had run, and by a writing signed by him—that is, signed by Mr. Lamb—that Mr. Lamb either acknowledged the debt, as I have explained the term acknowledgment to you, or made a promise in writing to pay the debt as I have explained that term "promise" to you, or that Mr. Lamb, before the limitation period had expired,

lulled Mr. Brown into inaction by an affirmative inducement offered to Mr. Brown to delay his bringing of the suit, and that Mr. Brown relied on this [Tr. 1311] affirmative inducement to his prejudice.

* * * * * * * * * *

[Tr. 1318] Ordinarily, an officer or an employee of a corporation is not personally responsible for the debts of the corporation unless the officer or employee expressly or impliedly agrees to pay the debts of the corporation, or unless by some conduct on his part, a reasonably prudent man under the circumstances, would have believed and understood that the officer or employee of the corporation had undertaken to be personally responsible for the corporation's debts.

Mr. Brown includes, also, in his claim, compensation for services rendered in a suit in this court and, since Mr. Lamb asserts that if anything is owing in the Federal Communications matter, it is due by Dispatch and not by him, I would like to makes it clear that while the proceeding in the Federal Communications Commission was one that involved the Federal Communications Commission and Dispatch Inc. the suit which was filed in this court, was filed [Tr. 1319] on May 11, 1954, and was dismissed a month later on June 11, 1954, was brought in the name of Edward Lamb, Dispatch, Incorporated, a Pennsylvania corporation, WHOO, Incorporated, a Florida corporation and Unity, Inc., an Ohio corporation. And the defendants in that case were all members of the Federal Communications Commission, so that in this suit Mr. Lamb was one of the parties for whom the suit was brought.

As I said, concerning this suit that was brought in this court, it was filed in one month and was dismissed the next. The transcript of the proceedings have been offered in evidence in that case and all of the proceedings are covered in this one transcript. The only witness called was Mr. Lamb and his testimony takes up six pages of this tran-

script. The hearing began on June 11, 1954, at 11:35 a.m. in the morning and it was concluded that day, and the Judge ruled that day, dismissing the suit on the motion of the Government, and Mr. Brown indicated that he would give notice, or did give notice, of appeal.

So, in this particular case that was in this court, there was no trial in any real sense—there were only two [Tr. 1320] motions here, one motion for preliminary injunction, and one motion to dismiss.

You are instructed that while there are two defendants in this lawsuit, that is to say, Mr. Lamb and Dispatch, it does not follow that if one is liable both are liable. Each is entitled to a fair consideration of his or its own defense, and is not to be prejudiced by the fact, if it should become a fact, that you may find against the other.

The general instructions which I gave you cover the case of each defendant in the action. If you should find that no defendant is liable, then your verdict should be in favor of both defendants against the plaintiff. If you should find that only one defendant is liable, then your verdict should be in favor of the plaintiff against that defendant alone.

You are really to regard this lawsuit as two lawsuits, one by Mr. Brown against Mr. Lamb, and one by Mr. Brown against Dispatch, Inc.

Depending on what you find the facts to be, your verdict as to each may be for the plaintiff or for the defendant.

[Tr. 1321] You are instructed that if you find that the plaintiff, Mr. Brown is entitled to recover in this case, then in the absence of an agreement as to the amount of the attorney's compensation, the jury is to fix the compensation at so much as the jury believes the plaintiff is entitled to receive as just compensation.

Now, you are told that the factors which may be considered in arriving at the amount of a recovery for services, if you find that the plaintff is entitled to recover, are these: You may consider the nature, extent and difficulty of the

services; the time devoted to the matter; the loss of opportunity for other employment, if you find that there was any such loss; the ability and standing of the attorney; the amount involved and the responsibilities assumed, the results or benefits obtained, and the usage and practice of the Court and the Bar as to the charges and what are the customary charges in such a case.

On this question of time, I say that you will take that into consideration, but you will recall Mr. Brown's testimony when he said that for a while he kept a record of his time and then that he did not keep a record for some [Tr. 1322] period, but he estimated his time, and I believe it was approximately 3,000 hours.

The hearing before the Examiner, I believe, took 60 to 65 days, and the time which Mr. Brown fixed for that particular hearing was 195 hours. When you have completed your deliberations and you return to the courtroom, the Clerk will ask you: "Do you find for the plaintiff or for the defendant, Edward Oliver Lamb?"

If you say that you find for the plaintiff the Clerk will then ask you: "In what amount?"

And, if you say that you find for the defendant, he will ask no further questions with respect to Mr. Lamb.

Then the Clerk will ask you: "Do you find for the plaintiff or for the defendant, Dispatch, Inc.?" If you answer that you find for Dispatch, Inc., nothing further will be asked of you, but if you say that you find for the plaintiff, then the Clerk will ask you: "In what amount?"

I thank the alternate jurors for their services as I do all of the jurors, and I will now ask the alternate jurors to step out of the box. If you have any possessions in the jury room you may go in there now and get them.

[Tr. 1323] Are there any objections or requests?

Mr. Burke: May we approach the bench, Your Honor?

The Court: Yes.

(At the Bench:)

Mr. Burke: Your Honor, I have one or two points—
The Court: I think I will let the jurors take a recess.

(In open Court:)

The Court: Members of the Jury, you may now have a five minute recess. Do not discuss this case, please.

(Whereupon, the jurors retired from the jury room.)

The Court: All right, Mr. Burke.
Mr. Burke: There are only a few items I would like to make an observation on, one is where you said the time of the hearings took a hundred and ninety-five hours, I think it was, but I feel if we were going to mention the hearing time we should also mention the other things and the days where it lasted late into the night, because this was testified to, and otherwise it would leave the impression that we are only entitled to 195 hours.
The Court: No, I said that he fixed the time at [Tr. 1324] 3,000 hours.
Mr. Burke: Yes, I know.
The Court: So, I don't see how they could possibly think that.
Mr. Burke: But I do think, since it was a major item as to the hearing, that it would not be proper to say just 195 hours, because there was much more time than that, and in fact it took a great deal more hours, and—
The Court: I know, but you have argued that.
Mr. Burke: Because there were some days when it went into the middle of the night, as was testified to, Your Honor, and I don't think that we should emphasize just that particular time without also describing the other.
Then you did separate the two defendants, but I think we didn't just represent Lamb in the suit that was filed in the District Court—as it related to Dispatch, Inc., because he wanted to get cleared of these charges—

The Court: I know that is what you claim, but at the same time he was in that suit only because he was an officer of Dispatch, Inc.

* * * * * * * * * *

Plaintiff's Exhibit No. 6: Excerpt From "The Planned Economy in Soviet Russia," by Edward Lamb

If the American planned economy is to be achieved, it becomes evident that those who produce, the workers and farmers, and those who defend, i.e., the militiamen, through joint action and organization, shortly must assume title to the means of production. Have the masses acquired a degree of enlightenment sufficient to overthrow the historical but outworn theological, nationalistic, social and economic dogmas? Capitalist economists are becoming doubtful of their premises. Socialists are accused of playing into the very hands of the Fascists. Many American Communists have been in a self-destructive struggle for leadership.

Soviet Russia's economic planning challenges the rest of the world as an alternative. Its experiments begin to arouse America. It is time to realize that the chart of human destiny justifies the most searching inquiry into the accomplishments of the one existent Socialized State.

Plaintiff's Exhibit 17 (McFarland Letter)

FCC 54-335
2764

FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D. C.

March 11, 1954

8410

Mr. Edward Oliver Lamb
500 Security Building
Toledo, Ohio

Dear Mr. Lamb:

This letter has reference to the application of Dispatch, Inc. (individually controlled by you) for renewal of license of Station WICU(TV), Erie, Pennsylvania, (BRCT-42). The Commission, as you know, deferred action on that application on July 29, 1953. Reference is also made to the Commission's statement in its letter of October 16, 1953, to WHOO, Inc. (also individually controlled by you) regarding the application of that corporation for television facilities in Orlando, Florida, (BPCT-1207). You will recall that in that letter the Commission stated (p. 2) that "The Commission is studying information which may possibly bear on Mr. Lamb's qualifications to own and operate a broadcast station."

As you are aware, in the hearing on your Mansfield (Docket 7589) and Columbus (Docket 7948) applications questions were raised by some of the competing applicants therein as to your qualifications to hold broadcast authorizations because of 1) the alleged advocacy by you, in your book "The Planned Economy of Soviet Russia," of the overthrow of the Government of the United States by unconstitutional means and 2) your alleged membership in certain organizations which had been denominated sub-

versive by the Attorney General of the United States. During the course of these proceedings the following testimony was adduced:

1. In your testimony in the Mansfield proceeding (Docket 7589), you stated, among other things, on cross examination the following:

Page 154

> Q. I will ask you in response, Mr. Lamb, to the suggestion made by Mr. Koteen, if you have ever advocated the communist form of government, and the communist form of economy, as being superior to the American economy and form of government? A. The answer is no.

2. In your testimony in the Columbus proceeding (Docket 7948), you stated, among other things:

Page 412

> The Witness: "I am stating as a matter of record here that I have been a member of no organization, I am a member of no organization which, as I understand it, has any un-American objective. And I will put my Americanism against that of any other person."

Additionally, in connection with these proceedings, you submitted your sworn statement of February 17, 1948, in which you stated, in pertinent part:

3. "So that there will be no question about Mr. Lamb's attachments, he is attaching hereto a specific unequivocal affidavit (marked "E") covering the fact that he never has been, and is not now, directly or indirectly, tied up with any organization advocating un-American principles, Communism, or violent overthrow of the Government of the United States."

AFFIDAVIT

(Paragraph 2) "That he is not now, and has not been in the past, a member of, nor has he knowingly associated with any organization or group advocating communism or the violent overthrow of the Government of the United States."

(Paragraph 3) "That he does not now, and never has, advocated improvements or changes in the American economic or political system, except by constitutional means."

(Paragraph 4) "That he is not a member of and does not support any organization that believes in or teaches the overthrow of the United States Government by force or by any illegal or unconstitutional methods."

After consideration of the hearing records and applications before it, and of the above sworn statement, the Commission concluded that a grant of your applications for FM facilities in Springfield, Ohio, (BPH-516, Docket 7238) and Mansfield, Ohio, (BPH-560, Docket 7589) would be in the public interest and, accordingly, granted said applications on March 12, 1948. Additionally, the Commission granted, on March 17, 1948, your application for television facilities (WICU) at Erie, Pennsylvania, (BPCT-246) and Columbus, Ohio, (BPCT-288). Thereafter, over a period of years, you received additional authorizations from this Commission and renewal of licenses for your existing facilities.

Thus, it is apparent that the Commission, in its earlier consideration of your various applications, was concerned with the allegations which had been made to the effect that you were a member of the Communist Party, or had been in some way associated with that Party. It is also apparent that your sworn testimony and your sworn statement and affidavit of February 17, 1948, were made by you in full

recognition of the Commission's concern and for the purpose of obtaining favorable Commission action upon your then pending applications. The Commission, however, is now in possession of information containing charges which raise questions concerning the correctness of averments made in your sworn testimony and your sworn statement and affidavit. This information contains charges that for a period of years, particularly the period 1944-1948, you were a member of the Communist Party. According to these charges, and particularly during the period 1944-1948, your name was included, at the direction of the then Chairman of the Lucas County Communist Party, upon the lists of members of the Communist Party to be solicited for financial contributions and, on the basis of these lists, you were actively solicited by officials of the Lucas County Communist Party and in response to such solicitation contributed money for the support of the said Party. Further, the charge has been made that, during the period 1934-1948 you closely associated with members of the Communist Party. In view of the foregoing, the Commission is unable, at this time, to conclude that your earlier statements referred to above accurately and truly reflected the facts and to make the required statutory finding that the public interest would be served by a grant of the application for renewal of license of Station WICU(TV).

This letter is being written to you in accordance with the provisions of Section 309(b) of the Communications Act of 1934, as amended, which requires that before any application be designated for hearing the applicant must be informed as to why a grant without hearing cannot be made and be afforded an opportunity to reply. The purpose of this is to give the applicant an opportunity to inform the Commission of any reason why it believes the application should not be designated for hearing. Any reply you wish to make should be filed in triplicate with the Commission within 30 days from the date of this notice.

Upon receipt of any such reply, the Commission will determine whether the matters mentioned above have been resolved and whether it can grant your application without a hearing. If it is unable so to find, it will designate your application for hearing upon the issues then obtaining. In the absence of a reply from you concerning the above matters, your application will be subject to dismissal pursuant to the provisions of Section 1.381 of the Commission's Rules.

By Direction of the Commission

MARY JANE MORRIS
Secretary

CC: James Lawrence Fly, Esquire
Fly, Shuebruk and Blume
30 Rockefeller Plaza
New York 20, New York

Plaintiff's Exhibit 18
Plaintiff's Exhibit 18, FCC Letter re WHOO, Br. 29

FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D. C.

October 20, 1954

WHOO, Inc.
Radio Station WHOO
Fort Gatlin Hotel Building
Orlando, Florida

Gentlemen:

The Commission has today considered the application to transfer control of WHOO, Inc., licensee of Stations WHOO and WHOO-FM, from Edward Lamb and Lamb Industries, Inc., to Radio Florida, Inc. (BTC-1808). The application for renewal of license of Station WHOO is also before the Commission at this time.

In view of the hearing presently being held upon the application for renewal of license of Station WICU(TV), Erie, Pennsylvania, involving the qualifications of Mr. Edward Lamb, the Commission has determined that it will not take any action upon the pending application for renewal of license of Station WHOO or upon BTC-1808 pending the outcome of the WICU renewal hearing. This is necessitated by the fact that Mr. Lamb's qualifications to be a licensee of this Commission are presently being examined in the WICU hearing. Accordingly, you are advised that no action will be taken on BTC-1808 pending the outcome of the renewal hearing involving Station WICU(TV).

By Direction of the Commission

WM. P. MASSING
Acting Secretary

CC: Lyon, Wilner & Bergson
Wyatt Building
Washington 5, D. C.

Krieger & Jorgensen
Wyatt Building
Washington 5, D. C.

Approved Commission Meeting 10/20/54, Item 2, AL & TC Agenda

Defendants' Exhibit 5

[Filed April 28, 1959]

IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO.

No. 186753

RUSSELL M. BROWN, 605 Southern Building, Washington, District of Columbia,

Plaintiff,

v.

EDWARD OLIVER LAMB, 408 East Broadway, Maumee, Ohio,

and

DISPATCH, INC., a corporation, 500 Edward Lamb Building, Toledo, Ohio,

Defendants.

PETITION

1. For his cause of action herein, the plaintiff, Russell M. Brown, says that he is an attorney at law duly admitted to practice in the Supreme Court of the State of Texas, the United States District Court for the District of Columbia, the United States Court of Appeals for the District of Columbia, and the Supreme Court of the United States, and is presently practicing law in the City of Washington, in the District of Columbia, and that he brings this action against Edward Oliver Lamb, of the City of Maumee, Lucas County, State of Ohio, and Dispatch, Inc., a corporation whose president and principal shareholder, Edward Oliver Lamb, has offices in 500 Edward Lamb Building, Toledo, Lucas County, and State of Ohio, and who, from that office, directs the activities of that corporation, which is a Pennsylvania corporation engaged in operating a television

broadcasting station known as WICU-TV, which broadcasts from the City of Erie in the State of Pennsylvania.

2. Pleading further, plaintiff says that he brings this action against the defendants, Edward Oliver Lamb, and Dispatch, Inc., to recover compensation for professional services rendered upon behalf of the defendants during the period from March, 1954, to June, 1957, as lawyer for the defendants when the Federal Communications Commission, an agency of the United States, refused to renew the broadcasting license, worth in excess of Five Million Dollars ($5,000,000.00), held by the corporate defendant, because the Commission had information containing charges, to wit:

A. That the defendant, Edward Oliver Lamb, had been a member of the Communist Party; and

B. That the defendant, Edward Oliver Lamb, had made contribution to the Communist Party and to Communist Causes; and

C. That the defendant, Edward Oliver Lamb, had a close association with the Communist Party and members of the Communist Party and Communist Causes over a long period of time.

The Federal Communications Commission, therefore, was not convinced that Edward Oliver Lamb was qualified to own a controlling interest in Dispatch, Inc., which corporation held the license to operate Station WICU-TV, located in Erie, Pennsylvania, and the Commission refused to renew the license for Station WICU-TV.

For further pleading, plaintiff says that the defendant, Edward Oliver Lamb, individually and as president of Dispatch, Inc., employed the plaintiff Brown as attorney in the matter of the renewal of the license of Station WICU-TV, and that said cause of action herein or some part thereof arose in Lucas County, Ohio.

3. Pleading further, plaintiff says that he, as an attorney for the defendants, represented the said defendants in the hearing before the Federal Communications Commission and, although he was successful in casting doubt upon the charges made against the defendant, Edward Oliver Lamb, and in securing the renewal of the license for Station WICU-TV for the defendant, Dispatch, Inc., they, the defendants, have wholly failed and have refused to pay him for said legal services.

4. Pleading further, plaintiff says that in 1950, Dispatch, Inc., was granted a license to own and operate a television broadcast station, WICU-TV, at Erie, Pennsylvania. This license was twice renewed, and would have expired on August 1, 1953. Application for further renewal was filed on April 21, 1953, but was neither granted nor denied when the expiration date arrived.

5. Pleading further, plaintiff says that during this time the plaintiff Brown was engaged in the practice of law in Washington, D. C., in association with J. Howard McGrath, former United States Senator and Attorney General of the United States. In October, 1953, said McGrath was appointed Executive Vice President of all of defendant Lamb's business interests, which included manufacturing, newspaper publishing and broadcasting—both in television and radio.

A. Said Lamb then owned, through his control of several corporations, radio broadcast licenses at Orlando, Florida, Station WHOO; at Erie, Pennsylvania, Station WIKK; at Springfield, Ohio, and at Mansfield, Ohio; at Toledo, Station WTOD; as well as the television broadcast license at Erie, Pennsylvania, WICU-TV.

B. Said Lamb had previously owned the television broadcast station at Columbus, Ohio, WTVN-TV, and

had sold that property for a price in excess of Two Million Dollars ($2,000,000.00).

C. While the qualifications of Edward Oliver Lamb were under the cloud of alleged Communist Party membership and association, the Federal Communications Commission refused to authorize a sale of any station, or any increase in power or improvement of facilities. Said Lamb repeatedly denounced this as "economic strangulation", and complained that the Commission's long delay of more than 18 months had caused serious "economic damage".

D. The fair market value of the television station at Erie, Pennsylvania, WICU-TV, at all times pertinent herein, was and still is, to the best of plaintiff's information and belief, not less than Five Million Dollars ($5,000,000.00).

E. Since the decision by the Commission in renewing the WICU-TV license, Lamb has been permitted to sell, and in fact has sold, the Toledo, Ohio, radio station WTOD, and the Orlando, Florida, radio station WHOO, for prices approximating Four Hundred Thousand Dollars ($400,000.00).

The Commission found that the Broadcast Bureau failed to prove that the defendant Lamb knew that the subversive organizations with which he had been affiliated or associated were in fact under the sponsorship of the Communist Party. The Federal Communications Commission was unable to find that said Lamb had lied when he disclaimed any Communist connection. As a direct result of this decision by the Federal Communications Commission the said Lamb was able to sell the Erie Dispatch, his Erie, Pennsylvania, newspaper, for the sum of One Million, Three Hundred Thousand Dollars ($1,300,000.00), which otherwise

would have been worthless if the finding had been against the defendant Lamb.

F. Since the decision of the Commission, Lamb has been permitted to improve, modify, and modernize his broadcasting stations.

G. Before the decision of the Commission, Lamb could not be granted any additional broadcast licenses; however, since the decision he may freely apply for and be granted such licenses on the same basis as any other applicant.

H. If the Commission had decided that said Lamb had in fact been a member of the Communist Party, a Communist contributor and supporter, and a close associate of Communists, he would have been subject to criminal prosecution under Section 1001 of the Criminal Code, Title 18 U.S.C.A., for false statements to an agency of the United States Government, and for perjury in making false statements under oath.

I. The stakes in this trial were not only the communications licenses, but the entire reputation of said Edward Oliver Lamb, first as a respectable and truthful person, and, second, as a loyal American citizen rather than one who would attempt to overthrow the United States Government by force and violence in a criminal conspiracy with the Communist Party.

6. Pleading further, plaintiff says that the active participation of plaintiff attorney, Brown, began on Monday, March 22, 1954, and from that day to the end of October, 1955, he was compelled to devote almost full time to conducting the entire litigation on behalf of Lamb and Dispatch, Inc., in the United States District Court for the District of Columbia, in the United States Circuit Court of Appeals for the District of Columbia, and before the Federal Communications Commission itself.

A. Plaintiff brought an action in the District Court to enjoin the Commissioners from further proceedings in this matter on the ground, *inter alia,* that it was beyond the scope of their legislative authority. On motion of the Government, and after a full hearing in open court, the action was dismissed as being premature.

1. However, just before the court proceedings, the Commission designated the entire matter for hearing before its own Hearing Examiner.

B. The Circuit Court of Appeals affirmed the dismissal, on the ground that the administrative remedy had not been exhausted. Plaintiff attorney wrote the brief on appeal and personally argued the case.

7. Pleading further, plaintiff says that the hearings before the Examiner began on September 15, 1954, and continued with various interruptions to May 24, 1955, when the record was closed.

A. The actual trial consumed 64 days in court.

B. Twenty-three (23) witnesses, including Lamb, were called by the Commission.

C. Nine (9) witnesses were called on behalf of Lamb.

D. The transcript of the trial is composed of 7,076 pages.

E. There were 100 documentary exhibits for the Commission, consisting of 900 pages; while 56 exhibits were offered for Lamb, embracing 83 pages.

F. In behalf of Lamb and Dispatch, Inc., plaintiff attorney Brown filed Proposed Findings of Fact and Conclusions covering 14 pages.

The Commission's representatives replied with Proposed Findings of Fact and Conclusions of Law in 335 pages.

In reply to this, plaintiff Brown, on October 17, 1955, prepared and filed Objections, and Proposed Findings (Revised) covering 115 pages.

1. These documents required a page by page and word for word study and analysis of the entire 7,076 page transcript and almost 1,000 pages of exhibits, since each statement of fact had to direct attention to the exact page of the testimony, or the particular part of the exhibit, where such fact was established.

G. In January, 1956, the Trial Examiner's decision of 140 pages was delivered, finding for Lamb and for Dispatch, Inc., on every issue, and directly following and adopting the findings and conclusions offered by plaintiff attorney.

H. An appeal to the full membership of the Federal Communications Commission was promptly taken by the Broadcast Bureau which urged that the Examiner's decision be reversed and that the Commission find that Lamb had lied under oath when he denied closely associating with and contributing to the Communist Party and its causes, and when he denied that he had advocated Communism as a desirable system of government and superior to our American constitutional form of government.

I. After deliberating for 18 months, the Commission, in June, 1956, rendered its decision of 58 pages, expressing strong doubts concerning Lamb's truthfulness, and deciding that the organizations with which Lamb had been identified were in fact Communist or Communist front organizations. However, the Commission conceded attorney Brown's argument that there was no proof that Lamb knew of their true nature, and for that reason the Commission could not determine that Lamb had intentionally lied when he denied

having Communist connections or associations. It therefore ordered the license renewed.

J. All of Lamb's other licenses had been held up until this decision was made, and thereafter they were also renewed.

8. Pleading further, plaintiff attorney says that he sent Lamb, individually, a bill for professional services in the amount of Two Hundred Thousand Dollars ($200,000.00). He also sent to Dispatch, Inc., a bill for Three Hundred Thousand Dollars ($300,000.00). Neither of said bills has been paid in whole or part, though plaintiff attorney respectfully represents that:

A. The case was by far the most difficult, involved and complex ever conducted before the Federal Communications Commission;

B. The demands upon plaintiff's time were so all-inclusive that he could not accept any other business, but was compelled to devote full time to this case, frequently from 12 to 20 hours daily, and on several occasions he was obliged to, and actually did, work through entire nights without sleep, and then resume the conduct of the trial in the morning;

C. Plaintiff attorney conducted widespread investigations and searches for witnesses who might aid the defense and who had knowledge of the facts. He interviewed many witnesses in Washington, D. C., Toledo, and other places in Ohio, Palm Beach, Florida, Chicago, Illinois, and in New York, N. Y. Some of these persons refused to discuss the matter at all, while others were subsequently called by the Commission and pleaded the Fifth Amendment as ground for refusing to testify. Some persons whom this attorney interviewed were unwilling to give any information except upon express assurance that both their names and the information

they furnished would be retained in the strictest confidence;

D. Plaintiff attorney also interviewed persons who called upon him and offered information intended to be helpful in defense of Lamb, but such persons refused to testify themselves or pleaded the Fifth Amendment when called as witnesses.

9. Pleading further, plaintiff says that the conduct of the defense was made extremely difficult and complicated by the strange behavior of Edward Oliver Lamb:

A. Lamb absolutely refused to discuss with plaintiff attorney his alleged Communist association as developed by the Federal Communications Commission, but insisted throughout that he had always opposed Communism. This conduct continued even though the Federal Communications Commission introduced in evidence copies of official Communist Party publications with articles purporting to be written by said Lamb praising the Communist movement.

B. This attorney engaged a special assistant and worked on the record some ten days from early morning to long past midnight in order to prepare said Lamb for his appearance on the witness stand, and enable him intelligently to answer the Commission's questions. Yet the said Lamb obstinately and wilfully refused to discuss the testimony against him, and flatly refused to give his attorney any information or answer any questions. As a result of this behavior, said Lamb was unable to answer sensibly when asked about his attachment to various Communist organizations, but elected to say, "I don't remember", or "I have no present recollection". When he was shown undeniable documentary evidence of his connection with such organizations, he said he didn't really know they were

Communist fronts. Lamb's evasive answers were made the basis of a special request that his license be denied on the ground that he lacked honesty and frankness in his answers.

C. By means of his newspaper Lamb continued, contrary to this attorney's express request, a sharp attack on, and intemperate criticism of, the Federal Communications Commission and its staff, sending copies of this publication to them in Washington, thus actually going out of his way to antagonize and irritate the very same people who would have to make the ultimate decision as to his honesty, loyalty, and character.

10. Pleading further, plaintiff says that as a direct result of the work done by this plaintiff, said Lamb and his various corporations were able to keep their communications licenses, and thereafter to sell two radio stations (WTOD, Toledo, Ohio, and WHOO, Orlando, Florida), for a total of Four Hundred Thousand Dollars ($400,000.00); because the Federal Communications Commission was not able to find that he had intentionally lied when he denied Communist attachments and connections, Lamb was able to sell his *Erie Dispatch* newspaper, which would otherwise have been worth only salvage, for a price of One Million, Three Hundred Thousand Dollars ($1,300,000.00), and secure from the purchasers a valuable long term lease of the real estate owned by said Lamb which the paper occupied; in addition, the corporate defendant, Dispatch, Inc., which is controlled, but not wholly owned, by said Lamb, now continues to own and operate television broadcast station WICU-TV and radio station WICU (formerly WIKK) at Erie, Pennsylvania. Moreover, said Lamb was saved from being publicly and officially branded a liar in denying Communist connections, and he avoided a criminal trial or trials for making false statements to a Government agency, or for perjury.

11. Pleading further, plaintiff says that the services rendered by this plaintiff attorney in producing approximately Seven Million Dollars ($7,000,000.00) in benefits for said Edward Oliver Lamb and the defendant corporation, Dispatch, Inc., and the avoidance of criminal prosecution of said Lamb, and the disgraceful label of Communist, are reasonably worth the sum of Five Hundred Thousand Dollars ($500,000.00), fairly distributed at Two Hundred Thousand Dollars ($200,000.00) payable by Edward Oliver Lamb individually, and Three Hundred Thousand Dollars ($300,000.00) by Dispatch, Inc.

12. Plaintiff attaches to this, his petition, interrogatories which are made a part hereof, to be answered by the defendant, Edward Oliver Lamb, as an individual, and interrogatories which are to be answered by the said Edward Oliver Lamb, as the president of Dispatch, Inc.

WHEREFORE, plaintiff prays judgment against defendant Edward Oliver Lamb, individually, in the sum of Two Hundred Thousand Dollars ($200,000.00), and against Dispatch, Inc., in the sum of Three Hundred Thousand Dollars ($300,000.00). Plaintiff further prays that the defendant, Edward Oliver Lamb, be required to answer the attached interrogatories, under oath, and that Edward Oliver Lamb, as president of the defendant Dispatch, Inc., be required to answer the interrogatories, under oath, which are hereto attached and addressed to Dispatch, Inc. Plaintiff further prays for any and all relief to which he may be entitled in the premises.

DAN H. MCCULLOUGH
Dan H. McCullough

RICHARD T. SECOR
Richard T. Secor

Attorneys for Plaintiff

A TRUE COPY
FRANCIS A. PIETRIKOWSKI, Clerk

STATE OF OHIO }
COUNTY OF LUCAS } ss.

RUSSELL M. BROWN, being first duly sworn, deposes and says that he is the plaintiff in the foregoing action; that he has read the said petition and that the facts and allegations therein contained are true as he verily believes.

RUSSELL M. BROWN

Sworn to before me and subcribed in my presence this 24th day of April, 1959.

PRAECIPE

TO THE CLERK:

Please issue summons to the Sheriff of Lucas County, Ohio, for the defendant, Edward Oliver Lamb. Endorse same, "Action for Money Only, Amount Claimed, Two Hundred Thousand Dollars ($200,000.00), Upon an Account for Services Rendered", and make the same returnable according to law.

Also issue summons for the defendant, Dispatch, Inc., and endorse same, "Action for Money Only, Amount Claimed, Three Hundred Thousand Dollars ($300,000.00), Upon an Account for Services Rendered", and make the same returnable according to law. Personal service of this summons should be made on Edward Oliver Lamb, who is an officer of defendant, Dispatch, Inc. After service is made upon Lamb as an officer of Dispatch, Inc., an attested copy of the summons with an endorsement of the service upon such officer should be sent to Dispatch, Inc., Erie, Pennsylvania, by registered mail, postage prepaid. We ask you to direct the Sheriff of Lucas County, Ohio, to forward a copy of said summons bearing the said endorsement of service in compliance with the terms of Sec. 2703.12, of the Revised Code of Ohio, and that the

Sheriff of Lucas County then make his return according to law.

DAN H. MCCULLOUGH
Dan H. McCullough

RICHARD T. SECOR
Richard T. Secor

Attorneys for Plaintiff

Plaintiff's Exhibit 32A

[Filed February 12, 1968]

MCGRATH & BROWN
ATTORNEYS & COUNSELLORS AT LAW
SUITE 605 SOUTHERN BUILDING
WASHINGTON 5, D. C.

STERLING 3-4636

June 18, 1957

Honorable Edward Lamb
Edward Lamb Building
Toledo, Ohio

Dear Ted:

Enclosed herewith are invoices addressed to Dispatch, Inc., and to you personally, covering the recently concluded litigation on Television Station WICU-TV. These relate to my personal services in the suit against the Commission in Washington, D. C., and the actual trial work and briefs before the Commission's Hearing Examiner. They cover the period from March 22, 1954 to the present.

At our last conference in Washington, you had no suggestion as to my compensation so I am forwarding these

invoices. I have recognized that there were two separate clients and have divided the total fee between them.

I am likewise recognizing that Howard McGrath's position as Executive Vice President of Edward Lamb Enterprises casts him in the role of the client, and I leave to him and you any questions as to his personal compensation.

Please accept again my sincere congratulations on your success in renewing the license and your personal vindication.

With every good wish, I am

Sincerely,

RUSSELL MORTON BROWN
Russell Morton Brown

RMB:m

Enclosures

cc: J. Howard McGrath
605 Southern Building
Washington, D. C.

Plaintiff's Exhibit 32B

[Filed February 12, 1968]

McGRATH & BROWN
ATTORNEYS & COUNSELLORS AT LAW
SUITE 605 SOUTHERN BUILDING
WASHINGTON 5, D. C.

—

STERLING 3-4636

June 25, 1957

Mr. Edward Lamb,
Post Office Box 1738,
Toledo, Ohio.

Dear Ted:

You have returned to me the invoices which I sent you for my personal services in connection with the affairs of Dispatch, Inc., recently concluded. I am returning them to you because I think you may find it desirable in the future to have these in your files.

I note what you have said about your relationship with the law firm of McGrath & Brown. Let me assure you once more, what I feel you have known and understood for a long while, that McGrath & Brown is not a law firm in the sense that it is a partnership; it is merely an association of lawyers for the purpose of sharing expenses and handling such matters in common as they see fit on a case-by-case basis.

I do not have extensive information about your relationship with General McGrath. I do know that General McGrath told me at the time he first became associated with you as your General Counsel and Executive Vice-President that he was undertaking this association as a personal matter and you had assured him that he was to be paid a salary for this association. When you hired General McGrath you certainly did not hire me and it was not until

the matters of Dispatch became involved in court litigation that I came into the case both at General McGrath's request and at your own. As a matter of fact, it was many months after General McGrath became associated with you that I was asked by him, and several times by you, to participate in the trial of the issues before the Congress, the Courts, and the Commission that had been raised by the Federal Communications Commission against WICU and your other radio properties. In this regard I felt that General McGrath and myself, jointly, were assigned by you to take over this particular litigation from the Fly firm.

I have known from General McGrath of his personal relationship with you and of his desire to be closely and personally associated with you in your numerous business operations for the purpose of showing unfailing confidence in your character and integrity, and nobody knows better than I do how tireless he has been in your defense against your traducers, and how deeply he has valued your friendship.

Your statement that payments exceeding $170,000 have already been paid the law firm of McGrath & Brown is not true. I do not know what you have paid General McGrath for his personal services in connection with numerous matters, but you are not justified in concluding that what was paid to General McGrath was to be divided in any way with me. I would be glad for you to furnish me a list of the dates, amounts, and sources of any payments and the specified item for which they were made.

I hope, Ted, that our pleasant association over the last three and a half years will not end by disrupting the relationship between me and General McGrath or between you and General McGrath, as well as myself. It seems to me that we ought to be able to dispassionately sit down and evaluate the services rendered to you both by General McGrath and myself, severally and jointly, giving due con-

sideration to everything that has transpired. After all, Ted, the service which was rendered to you has resulted in your retaining licensed properties worth many millions of dollars that without the vigorous, forthright, and constant attention which we have given to it from the very beginning might well have been lost to you, or at least could have become the subject of court litigation that could have gone on for years and years to come.

If you hired a broker to sell these properties for you, you would have had to pay him a commission not vastly different from the value which I placed on my services for having freed these properties so that you might continue to operate them or dispose of them at will.

Sincerely,

RUSSELL MORTON BROWN
Russell Morton Brown

Plaintiff's Exhibit 32C

[Filed February 12, 1968]

McGRATH & BROWN
ATTORNEYS & COUNSELLORS AT LAW
SUITE 605 SOUTHERN BUILDING
WASHINGTON 5, D. C.

STERLING 3-4636

July 2, 1957

Mr. Edward Lamb,
Post Office Box 1738,
Toledo, Ohio.

Dear Ted:

By letter of June 25 I returned to you the two invoices (which you had previously mailed back to me) covering my services as counsel before the F.C.C. Since then

Howard tells me he has talked with you personally in Akron and Toledo about the same subject.

As I understand it from Howard, you feel that my charges are too high. Of course, I intend to be perfectly reasonable and would welcome any suggestion from you on the subject. Remember, Ted, that this is wholly deductible for tax purposes, and it is certainly possible that we may be able to work out a program for payment over a period of several years.

Please let me hear from you at your early opportunity.

Sincerely,

Russ
Russell Morton Brown

RMB:dw

cc: J. Howard McGrath
Sunnybrook Farm
Narragansett, R.I.

Plaintiff's Exhibit 32D

[Filed February 12, 1968]

McGrath & Brown
ATTORNEYS & COUNSELLORS AT LAW
SUITE 605 SOUTHERN BUILDING
WASHINGTON 5, D. C.

STERLING 3-4636

August 1, 1957

Mr. Edward Lamb,
Post Office Box 1738,
Toledo, Ohio.

Dear Ted:

On July 2, 1957, I wrote you saying that Howard had told me you felt that my bills for trial of the case before the

Federal Communications Commission were too high, and I asked you to give me your suggestions. I have heard nothing from you to date in response to this letter.

As you will recall, I suggested when you and Howard and I talked about the matter at the Mayflower Hotel here that we submit the matter for arbitration: that you appoint one representative and I appoint another, and that they both pick a third and so fix the fee after hearing from both sides. I am again raising this for your consideration as a quick and easy, thoroughly fair, procedure.

Please let me have your views at an early date.

Sincerely,

Russ
Russell Morton Brown

Plaintiff's Exhibit 32E

[Filed February 12, 1968]

McGrath & Brown
ATTORNEYS & COUNSELLORS AT LAW
SUITE 605 SOUTHERN BUILDING
WASHINGTON 5, D. C.

STERLING 3-4636

November 4, 1957

Mr. Edward Lamb,
Post Office Box 1738,
Toledo, Ohio

Dear Ted:

We have had some discussions and correspondence regarding payment of your bill for my legal services in connection with the FCC matters and those of your corporation, Dispatch, Inc. We have not been able to agree on a

fee and you have not stated your views at all. I have offered to arbitrate the matter and have received no reply from you. I have written you at least twice without response.

This is to inform you that I will feel obliged to take legal action unless we can reach an agreement immediately. This is also to let you know that I do not regard any payments made by Air-Way Electric Company or Air-Way Industries, Inc., as available to you for credit.

I hope we can work this out in a sensible manner and that you will give it your early attention.

Sincerely,

Russ Brown
Russell Morton Brown

Plaintiff's Exhibit 32F

[Filed February 12, 1968]

November 7, 1957

McGrath & Brown,
605 Southern Building,
Washington 5, D. C.

Attention: Russell M. Brown

Dear Russ:

Thank you for you letter of November 4th. You do not indicate that you have sent a copy to Mr. McGrath, so I will send a copy thereof, together with a copy of this reply, to his attention.

I discussed this matter with Howard McGrath and he will undoubtedly discuss it with you in due course. It is

possible that his temporary absence in the hospital for a check-up may have prevented your discussions.

With my best wishes, I am

Cordially yours,

EDWARD LAMB

Plaintiff's Exhibit 32G

[Filed February 12, 1968]

RUSSELL MORTON BROWN
ATTORNEY AND COUNSELOR AT LAW
605 SOUTHERN BUILDING
WASHINGTON 5, D. C.

13 November 1958

Mr. Edward Lamb
Edward Lamb Enterprises, Inc.
Fifth Floor, Edward Lamb Building
Toledo, Ohio

Dear Ted:

Please give me a definite date when you will be in Washington to discuss the question of my compensation for the F.C.C. Case. I would like to arrange for Howard McGrath to be present so we can discuss the matter together.

Sincerely,

RUSSELL MORTON BROWN
Russell Morton Brown

FMB:vpb

Planitiff's Exhibit 32H

[Filed February 12, 1968]

RUSSELL MORTON BROWN
ATTORNEY AND COUNSELOR AT LAW
605 SOUTHERN BUILDING
WASHINGTON 5, D. C.

October 27, 1958

Mr. Edward Lamb
Edward Lamb Building
Toledo, Ohio

Dear Ted:

I have refrained from taking any action to collect a fee for my services in connection with the Federal Communications Commission hearings involving your qualifications to be a broadcaster, in the hope that we might reach an amicable solution. However, there seems to be no point in further delay, and I expect shortly to initiate litigation for this purpose.

In the hope of avoiding such action, and without prejudice to my claim in any way, you may pay this fee on a monthly basis over a period of time. You will recognize that, in view of the favorable decision you received, this will be completely tax-deductible. Surely, Ted, a fair review of the services I performed as your counsel, the manner in which they were performed, and the value of the results obtained, will show this to be a very reasonable and sensible solution to the problem.

I will wait briefly for a response from you before I take other action. You may be certain that I will do so only with the greatest reluctance, but of course you will see that I have no other choice.

I hope this finds you and your family all enjoying the very best of good health and happiness, and with kindest regards to our mutual friends, I am

Sincerely,

RUSSELL BROWN
Russell Morton Brown

RMB:bw

Plaintiff's Exhibit 32I

[Filed February 12, 1968]

October 30, 1958

Mr. Russell Morton Brown,
605 Southern Building,
Washington 5, D. C.

Dear Russ:

Thank you for your letter of October 27th in which you suggest that you have refrained from "taking action" with the hope that you could reach an amicable solution. You suggest that if you do take such action, it will be with great reluctance, but that you have no other choice.

I do not wish to hold you up in taking any steps you might think feasible. I have told you before that I do not object to meeting with you alone or with Howard McGrath to discuss any item. I have told you also that I would be glad to chat with you when I am in Washington, and I certainly do not have any objection to your coming to Toledo to discuss anything that you may wish to talk about. There is certainly no intention on my part to delay disposition of the matter. I do not get to Washington as often as I would like.

With my best wishes, I am

Cordially yours,

EDWARD LAMB

Plaintiff's Exhibit 32J

[Filed February 12, 1968]

BROWN, GOODPASTURE & BLOCK
ATTORNEYS AND COUNSELORS AT LAW
FEDERAL BAR BUILDING
1815 H STREET, N. W.
WASHINGTON 6, D. C.

December 17, 1962

Mr. Edward Lamb
Edward Lamb Building
Toledo, Ohio

Dear Ted:

Sorry we couldn't get together when I was in Toledo last week. I feel that if you and I could sit down together without intermediaries we might be able to work out our differences.

If you feel disposed to approach the matter on this basis I would be happy to meet with you at a mutually convenient time and place, with the understanding that there will be no prejudice whatever from anything that is said or done at such a conference.

This meets fully with Gene Farber's approval and that of Merritt Green, my present counsel, as well.

Sincerely,

RUSSELL BROWN
Russell Morton Brown

CC: Eugene Farber
Merritt W. Green

RMB: bw

Plaintiff's Exhibit 32K

[Filed February 12, 1968]

June 24, 1957

Mr. Russell M. Brown,
McGrath and Brown,
605 Southern Building,
Washington, D. C.

Dear Russ:

This will aknowledge receipt of your letter of June 18th.

You suggest that you are now treating J. Howard McGrath as "a client", rather than as a partner. This new treatment, you say, is because of his position as a Vice President of Edward Lamb Enterprises, Inc. I do not know what the latter company has to do with the matter.

My relations with the law firm of McGrath and Brown have, of course, been through Mr. J. Howard McGrath even though you and others in your firm may have participated in parts of the hearing before the Trial Examiner.

Payments exceeding $170,000 have already been made to the law firm of McGrath and Brown, but of course I have no way of knowing of the division of the fees between the members of the law firm.

I am, therefore, returning your bills to you so that you can discuss the matter further with your partner.

Cordially yours,

EDWARD LAMB

WL/ch
Wncks,

cc: Mr. J. Howard McGrath

Plaintiff's Exhibit 32L

[Filed February 12, 1968]

December 26, 1962

Mr. Russell Morton Brown
Federal Bar Building
1815 H Street, N. W.
Washington 5, D. C.

Dear Russ:

Thank you for your letter of December 17 suggesting that we sit down to discuss our differences "without intermediaries" being present. I do not have any objection to such a procedure as long as the meeting is held without prejudice to our future relationship. Offhand, I think it just as well to avoid further expenses in this matter.

I am in and out of the city quite a bit. I am leaving for a skiing trip to the West Coast for a couple of weeks. Maybe upon my return, we can work out some kind of a schedule.

Cordially yours,

EDWARD LAMB
Edward Lamb

EL.JM

cc: J. Eugene Farber
Dan H. McCullough
Merritt W. Green.

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,686

RUSSELL MORTON BROWN, *Appellant*

v.

EDWARD OLIVER LAMB, and DISPATCH, INC., a Pennsylvania Corporation, *Appellees*

Appeal From the United States District Court for the District of Columbia

BRIEF FOR APPELLANT (WITH APPENDICES)

MILTON M. BURKE
1010 Vermont Ave., N.W.
Washington, D. C.

GEORGE E. C. HAYES, JR.
613 F St., N.W.
Washington, D. C.

RUSSELL MORTON BROWN
Federal Bar Building
Washington, D. C.

Attorneys for Appellant

May 13, 1968

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

QUESTIONS PRESENTED

1. When a person asks his attorney not to sue for fees, and by affirmative inducements leads that attorney to delay filing suit by urging his need for time to raise money and clear up business problems, promising to arrange a satisfactory settlement if the attorney would forbear, may that person later rely on the statute of limitations when the attorney finally brings suit for fees?

2. When a person, by affirmative inducements, language or conduct, causes his attorney to delay filing suit for fees, may that person be estopped by his own conduct from relying on the statute of limitations as a bar to the attorney's action?

3. When a jury has found that the plaintiff attorney delayed court action to recover fees in reliance on affirmative inducements of the defendant, may the trial judge grant defendant judgment notwithstanding the verdict, on the ground that only a written instrument will relieve against the bar of limitations?

4. When a jury verdict as to the value of attorney's services is fully supported by the only evidence in the case directly pertinent to the facts, may the trial judge, on a post-trial motion, set it aside as excessive due to jury prejudice produced in final argument, when no objection to that argument was made, no prejudice alleged, and the court's instructions to the jury were wholly curative?

5. May the trial judge impute to the jurors a prejudiced state of mind without justification of any kind except the large size of the verdict?

6. May the trial judge order a new trial because the verdict as to value of attorney's services is excessive, without analysis of the record, and in disregard of the expert testimony adduced on the trial?

This case has not
previously been
before this Court.

INDEX

CITATIONS

CASES:

* Cases chiefly relied upon are marked by asterisks.

Page

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APPENDICES

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No.

RUSSELL MORTON BROWN, *Appellant*

v.

EDWARD OLIVER LAMB, and DISPATCH, INC., a Pennsylvania Corporation, *Appellees*

Appeal From the United States District Court for the District of Columbia

---

BRIEF FOR APPELLANT

JURISDICTION

This case is an appeal, pursuant to Title 28, United States Code, § 1291, from a final judgment rendered by the United States District Court for the District of Columbia, setting aside a $400,000 jury verdict for attorney's fees, rendering judgment n.o.v.

STATEMENT OF THE CASE

In May 1963, plaintiff-appellant, Russell Morton Brown, a Washington, D.C. attorney, filed suit against Edward Lamb, a citizen and resident of Toledo, Ohio, and Dispatch, Inc., a Pennsylvania corporation, to recover the reasonable value of legal services performed during the period 1954 through mid-1957 (JA 3).

These services related to a proceeding before the Federal Communications Commission which had refused to renew the broadcast license of defendant Lamb and his individually controlled corporation, Dispatch, Inc.,[1] for reasons set forth in a so-called McFarland letter (Pl. Exh. 17, JA 70) stating that the Commission had "information containing charges" that (1) Lamb had been a member of the Communist Party, (2) he had contributed to the financial support of that Party, and (3) he had closely associated with members of the Communist Party. The Commission referred to sworn statements and testimony by Lamb in obtaining broadcast licenses from the Commission, particularly (1) in denying that he had advocated overthrow of the United States Government in his book "The Planned Economy in Soviet Russia", and (2) in denying membership in organizations listed by the Attorney General as "subversive". Due to its doubts about the truthfulness of his earlier statements, the Commission was unable to find that the public interest would be fostered by renewal of the license. He was given 30 days to reply.

From March, 1954, through June 15, 1957, the plaintiff attorney represented defendants, Lamb and his corporation, Dispatch, Inc., in the District Court (Pl. Exh. 37), in this Court (Pl. Exh. 22), and in a protracted hearing before the Commission's Examiner, eventually securing a complete renewal of the license upon the Commission's conclusion that there was no proof of wilful misrepresentation (Pl. Exh. 70).

This suit was instituted in May, 1963, to recover payment for attorney's fees earned in that service.

Defendants pleaded limitations under the District of Columbia three-year statute (App. A, *infra*, p. 1). By successive motion for summary judgment, defendants sought

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[1] The other stockholders then were members of Lamb's family, individually or beneficially (Pl. Exh. 9).

to have the suit dismissed because of the statutory bar of limitations (JA 13, 14). By affidavit, plaintiff set forth that he had been expressly requested by defendants to delay the filing of this suit in the District of Columbia upon the promise that the entire matter would be satisfactorily resolved without court action; that in response to such requests, repeatedly made, and in reliance upon the assurance of settlement without litigation, plaintiff had accordingly delayed. Twice the District Court denied the motions for summary judgment, holding there was an issue of fact to be determined upon trial of the case (JA 13, 15).

In October, 1967, a jury was empaneled in the District Court before Judge Burnita Shelton Matthews and proceeded to trial on the merits. On November 1, the 12th day of the trial, the jury returned a verdict, awarding the plaintiff $150,000. as against defendant Lamb, and $250,000. as against the corporation, Dispatch, Inc. (JA 2).

Thereafter, the trial judge on December 22, 1967, granted defendants' motion for judgment n.o.v., holding that the bar of limitations had not been overcome because there was no instrument in writing as required by D.C. Code § 28-3504 (1967), and ordering further if that judgment be vacated or reversed, then "a new trial should be granted on the ground that the verdicts are excessive and that the manner in which plaintiff presented his case was such as to prejudice the jury against the defendants." (JA 16) This last conclusion was based in part upon the final argument by plaintiff's counsel, emphasizing the difficulty and magnitude of plaintiff's accomplishment in successfully clearing defendant Edward Lamb of charges that he had advocated Communist changes in American government in his book, "The Planned Economy of Soviet Russia" (Pl. Exh. 6, (JA 69).

This appeal brings up for review the propriety of that order, both in granting the judgment n.o.v. and in ordering a new trial.

CONSTITUTIONAL PROVISION, STATUTES, AND RULES INVOLVED

These references are set forth in Appendix A of this brief.

STATEMENT OF POINTS

POINT No. 1) The Court erred in granting defendants' motion for judgment n.o.v., ruling that a written instrument is necessary to avoid the bar of the statute of limitations, and that no words or conduct can create an estoppel against a defendant seeking to plead limitations. This refers to the Court's error No. 1 in granting the motion for judgment n.o.v.

(POINT No. 2) The Court erred in ordering a new trial because of the excessiveness of the verdict which she ascribed to prejudice on the part of the jury aroused by counsel's summation, because:

(a) there was no objection to the argument;

(b) the argument itself was not inflamatory but was based upon the evidence, and directed to the issues involved in the case;

(c) counsel expressly told the jury there was no suggestion the defendant was a Communist, but he emphasized the serious nature of the charges against him which plaintiff had successfully overcome;

(d) the Court's instructions to the jury were completely curative;

(e) the amount of the verdict is fully supported by the evidence.

This refers to error No. 2, in granting a new trial.

SUMMARY OF ARGUMENT

I. The ruling of the trial judge is too narrow in holding that § 28-3504 (1967) of the District of Columbia Code is the only possible means of avoiding the bar of the statute. That statute provides that "evidence of a new or continuing contract whereby to take the case out of the operation of the statute of limitations or to deprive a party of the benefit thereof" must be "in writing". Such a statute is obviously limited in its terms to that circumstance where the parties make an express new agreement to revive a barred obligation or alter the effective date of limitations. For obvious reasons of policy, the statute requires a written instrument, but the statute does not in itself annul all the other equitable principles of jurisprudence which have been developed over the centuries.

a) In the case at bar, the principle relied upon by appellant is estoppel, based on equitable principles, which prohibits one person from inducing another to act in reliance on his request, and then seeks to take advantage of the concession so received. The maxim is that, "No man may take advantage of his own wrong," and this has been repeatedly applied to avoid unjust reliance on limitations.

b) In the case at bar the plaintiff delayed filing suit at defendants' express request, and in reliance on the promise that they would settle the matter without litigation if he would only give them time to complete other matters, and to raise the money. The jury, under proper instructions from the court, considered this defense to limitations and answered it in favor of the plaintiff. The order for judgment n.o.v. is based directly on the provisions of the D.C. Code, § 28-3504 (1967), requiring a written instrument. It ignores the doctrine of equitable estoppel, which also suspends the running of limitations, and is therefore erroneous.

II. The trial court erred in ordering a new trial for excessiveness of the verdict, as a result of prejudice caused by counsel's summation because the argument was based upon evidence in the case and was not inflammatory. The trial judge seems to have felt the defendant was being here charged with being a Communist. The fact is that precise charge was the one which plaintiff attorney had successfully fended off.

Whether he was or was not so affiliated, and whether or not he had "advocated" Communism, were the precise issues involved in the F.C.C. proceedings. Plaintiff intended no "intimations" as the Court suggests, these were the allegations against defendant Lamb. Counsel's argument was that Lamb's lawyer, plaintiff below, appellant here, had defended well, in the face of a strong attack upon him in the F.C.C. proceedings.

There was no objection of any kind to the argument or to any of the documents or exhibits relating to the F.C.C. proceeding. Plaintiff's counsel expressly disavowed any suggestion that it was claimed Lamb was an actual Communist but only that he faced serious charges. The Court instructed in precise and careful terms that the F.C.C. documents and exhibits were admitted only to show what was the nature of the controversy and not to show the truth of the matters contained or asserted. She told the jury they were not to consider whether Lamb was a Communist or not because that was not an issue, and instructed them they were to harbor no prejudice against him on that score.

Finally, analysis of the record shows beyond question that the verdict is wholly supported by substantial evidence, in fact the only evidence as to the value of these services. It is not disputed that this television station, the broadcast license for which was at stake, at the conclusion of the F.C.C. proceedings was worth at least $6 million. Plaintiff Brown testified that on the basis of factors set forth in the Canons of Professional Ethics, it is his opinion that

the fee should have been $500,000. A practicing attorney of the local bar testified that the fee should range from a $300,000. minimum to $700,000. based on the economic benefit to the client.

Another D.C. attorney of long practice testified that the fee should range from 10 to 20% of the value of the station, or from $600,000. to $1,200,000.

The jury award in the case below works out at 6⅔% of the minimum value placed on this station. By comparison with other fees authorized by statute and allowed by the courts, this is a very reasonable verdict and since it is supported by substantial evidence, the trial judge unconstitutionally encroached upon the jury's function in ordering a new trial.

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR JUDGMENT NON OBSTANTE VEREDICTO WHEN SHE RULED THAT A WRITTEN INSTRUMENT IS NECESSARY TO AVOID THE BAR OF THE STATUTE OF LIMITATIONS, AND THAT NO WORDS OR CONDUCT CAN CREATE AN ESTOPPEL AGAINST THE DEFENDANT SEEKING TO PLEAD THE STATUTE OF LIMITATIONS.

The order for judgment n.o.v. (JA 16) recites that

> "no evidence was adduced at the trial of a character requisite for taking this action out of the statute of limitations . . ."[2]

citing D. C. Code § 28-3504 (1967) (App. A), which requires a writing to prove "a new or continuing contract whereby to take any case out of the statute of limitations."

It seems clear that the decision below disregards the applicable principles of estoppel in pais, or equitable estop-

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2 (Vol. X, Tr. A-23) The Court said: "(what) you have here is some oral statement of Mr. Brown's that Mr. Lamb said something * * *. Well, I think you are going to have to have something in writing."

(Vol. X, Tr. B-6) The Court said: "However, I don't find any case that doesn't have some 'writing' where they talk about estoppel."

pel, fully settled in plaintiff's favor by the jury verdict, under proper instructions of the court.

In fact the lower court cites in its order decisions of this Court expressly recognizing the estoppel doctrine. In *Hornblower* v. *George Washington University,* 31 App. D.C. 64, 75 (1908), the Court considered the case of an architect suing for professional fees. The trial court had upheld a plea of limitations and entered judgment for defendant.

On appeal, the Court (p. 73-79) carefully considered D. C. Code § 1271 (now the 1967 § 28-3504 involved here), and held that a certain letter relied upon by the plaintiff was insufficient as "a new contract" under that statute.

However, the parties had agreed to arbitrate and it was argued that this stopped the running of the statute of limitations. The Court's discussion is directly pertinent to the case at bar and must be deemed a charter for reversal here.

> (p. 75) "We think it is a well-settled principle that *a defendant cannot avail himself of the bar of the statute of limitations, if* it appears that *he has done anything to lull the plaintiff into inaction,* and thereby permit the limitation prescribed by the statute to run against him. If by this agreement to arbitrate, it appears from the record that plaintiffs, by the action of the defendant, *were induced not to bring their suit, then we think defendant would be estopped from pleading the bar of the statute of limitations.*" (italics supplied)

This Court clearly set forth the criterion for decision in the *Hornblower Case:*

> "Defendant must have done something that amounted to an *affirmative inducement* to plaintiffs to delay bringing action." (italics supplied)

In the absence of such "affirmative inducements", no estoppel existed, and the dismissal below was affirmed.

This estoppel was in no sense made to depend upon the existence of a written instrument under the D. C. Code provision applied by the trial court in this case. Judge Van Orsdel for the Court in the *Hornblower Case* considered both that statute and the estoppel doctrine as independent means of avoiding limitations. The distinction between "a new promise" and estoppel is thoroughly recognized, and the D. C. Code section has never, before this case, been construed as outlawing the equities from juristic relations. The language of Judge Van Orsdel, quoted above, clearly shows the complete independence of the two concepts: the statute relates solely to evidence required to prove an express agreement, but the vital equities of estoppel remain unimpaired. The key words in the *Hornblower Case* are "affirmative inducements". If defendant has so delayed plaintiff's suit he will be held estopped to plead limitations.

Also cited by the trial court in this case was *Howard University* v. *Cassell,* 75 App. D. C. 75, 81, 126 F. 2d 6 (1941), another claim for services by an architect. Defendant appealed from a judgment for plaintiff. The architect claimed, inter alia, that he had been lulled into delaying suit beyond the limitation period "because of conduct which led him to believe he would be paid" (p. 79). Judge Groner quotes with approval (p. 81) from the *Hornblower Case* on estoppel, concluding with the requirement that "affirmative inducement" to delay be shown by plaintiff. In the absence of such proof, the suit was ordered dismissed. Again, it is to be noted that no requirement of a writing was suggested as necessary to create estoppel.

Probably best for present purposes is the Supreme Court decision in *Glus* v. *Brooklyn Eastern District Terminal,* 359 U. S. 231 (1959), where plaintiff sought damages under the Federal Employers' Liability Act for industrial disease. While plaintiff filed suit beyond the 3-year limitation period, he claimed that representatives of the employer had

"fraudulently or unintentionally" represented to him that he had seven years in which to sue. The trial court dismissed the action as untimely, and the Second Circuit Court of Appeals affirmed.

In terms directly applicable to the case at bar, the Supreme Court reversed, holding the defendant estopped to plead limitations under the circumstances. Justice Black's opinion is terse and to the point:

> (p. 232) "To decide the case we need look no further than the maxim that *no man may take advantage of his own wrong.* Deeply rooted in our jurisprudence, this principle has been applied in many diverse classes of cases by both (233) law and equity courts and has frequently been employed *to bar inequitable reliance on statutes of limitations.*" (italics supplied)

Quoting an early Supreme Court decision in *Union Insurance Co.* v. *Wilkinson,* 80 U. S. 222, 233 (13 Wall.) (1871), the Court states the well recognized rule:

> (p. 233) "It is in precisely such cases as this that courts of law in modern times have introduced the doctrine of *equitable estoppels,* or, as it is sometimes called, *estoppels in pais.* The principle is that where one party has *by his representations or his conduct* induced the other party to a transaction to give him an advantage which it would be *against equity and good conscience for him to assert,* he *would not in a court of justice be permitted to avail himself of that advantage.* * * * the general doctrine is well understood and is applied by courts of law as well as equity where the technical advantage thus obtained is set up and *relied on to defeat the ends of justice or establish a dishonest claim.*" (italics supplied)

In *Schroeder* v. *Young,* 161 U. S. 334, 343-4 (1895), cited in the *Glus Case,* the Court utilized estoppel to prevent reliance on limitations, because the purchasers at a foreclosure sale told the debtor "that he would not be pushed, that the statutory time to redeem would not be insisted

upon; and (the debtor) believed and relied upon such assurance."

Justice Black quotes with approval from the *Schroeder Case* (p. 233)saying:

> The Court pointed out that in "such circumstances the courts have held with great unanimity that *the purchaser is estopped* to insist upon the statutory period, *notwithstanding the assurances were not in writing,* and were made without consideration, upon the ground that *the debtor was lulled into a false security.*" (italics supplied)

Cogently reasoning that the Federal Employers' Liability Act is not, by its three-year limitation, to be construed as making inapplicable "this principle of law, older than the country itself" (p. 234), the Court clearly illustrates that the rule of estoppel stands on its own. *Belton* v. *Traynor,* 381 F. 2d 82, 87 (4th Cir. 1967). It should apply independently of the D. C. Code provision requiring written evidence to prove a new promise. Certainly, it is not to be argued that the Code provision abolished equitable estoppel, any more than did the Federal Employers' Liability Act; or the one-year limitation for suit on Government contractors' bonds contained in the Miller Act. *E. E. Black, Ltd.,* v. *Price-McNemar Const. Co.,* 320 F. 2d 663 (9th Cir. 1963).

This Court expressly followed the estoppel doctrine of *Glus* v. *Brooklyn Eastern Terminal, supra,* and *Schroeder* v. *Young, supra,* in *Fontana* v. *Aetna Casualty & Surety Co.,* 124 App. D. C. 168, 171, 363 F. 2d 297 (1966), a suit by an insurer to recover payments made on a fraudulent claim. The defense of limitations was held unavailing since the defendant, by cashing the payment checks, in effect had renewed his false claim statement.

These decisions announce a rule of law which is simply stated: When one party to an agreement causes the other *by affirmative inducements* to delay filing suit, he cannot

thereafter defend such a suit by pleading the statute of limitations.

On the record below, the plaintiff's case is strong and direct:

Plaintiff Brown, and Mrs. Sunne Miller, former manager of Lamb's Toledo radio station, WTOD (Tr. 551-552 JA 39), both testified to discussions with J. Howard McGrath at Lamb's request (Tr. 819-820; Tr. 590-591 JA 49, 46), regarding payment of fees. McGrath assured Brown that if he would refrain from suing, Lamb would "take care" of the fee (Tr. 590-591; 846 JA 49, 57).

Brown testified that Lamb expressly asked him not to sue in the District because he was involved in another suit in New York, he was taking over the Seiberling Company with all the money he could raise, and he needed time "to build up" the Erie station (Tr. 848-849 JA 58). He assured Brown (Tr. 848), "If you will just give me time, I'm sure that you and I will be able to compose our differences. We will be able to settle very satisfactorily if you will just give me time to get my affairs in shape."

As a result of this request, and McGrath's belief in Lamb's sincerity, Brown agreed to delay his suit (Tr. 849-850 JA 59).

The trial judge instructed the jury on "the doctrine of estoppel" (Tr. 1304), and she correctly stated the plaintiff's claim that he had been "lulled into not filing suit by words or conduct on the part of Mr. Lamb so as to permit the limitations prescribed by the Statute of Limitations to run against him."

The trial judge then very properly set forth the standards as this court expounded them in *Hornblower* v. *George Washington University, supra,* particularly emphasizing the need for finding "affirmative inducements" to plaintiff not to sue (Tr. 1305):

> In order that the principle of estoppel may operate, however, the plaintiff, Mr. Brown, must show to the

jury by the evidence that Mr. Lamb did something that amounted to an affirmative inducement by him to Mr. Brown to delay bringing this suit,

—that this was done before the limitation period had expired, and

—that by such affirmative inducement Mr. Brown was lulled into a false security.[3]

Now, the jury must search the evidence in this case to see whether it reflects the presence or absence of any such affirmative inducement offered to Mr. Brown by Mr. Lamb, and whether Mr. Brown acted on it to his prejudice, if there was such an affirmative inducement.

After restating these principles, the trial judge outlined a procedure for jury deliberation.

(Tr. 1311) If the jury should find Mr. Brown has failed to successfully carry his burden of proof as to the Statute of Limitations, then your verdict would be for the defendants.

That would end the case and you would not need to consider anything further.

* * *

My suggestion to the jury is that you first take up the question of whether the Statute of Limitations is applicable. As I have said to you, if the Statute of Limitations applies, it makes no difference whether the claim was originally well-founded or ill-founded, and you would return a verdict for the defendants if you find that the Statute of Limitations is applicable.

On the contrary, if you find that the Statute of Limitations does not apply, or that a defendant is estopped from asserting it, then you would take up for consideration (Tr. 1312) Mr. Brown's claim for services.

When the jury returned a verdict in favor of plaintiff, it would seem to settle for all time the question of limita-

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[3] This language is used in *Schroeder* v. *Young*, *supra*, at p. 343, and quoted by Black, J., in the *Glus Case*, *supra*, at p. 233, and by this Court in the *Fontana Case*, *supra*, at page 171.

tions, and whether or not there were "affirmative inducements" offered to the plaintiff to delay filing suit on the promise of a satisfactory settlement. It settled, too, the estoppel issue as a question of fact.

Illuminating the basic principle, the various Courts of Appeals in 1963 were busy with suits against a number of large corporations convicted of price-fixing violations. Section 4B of the Clayton Act authorizes suit for treble damages by persons injured by such illegal conduct. Since the price-fixing conspiracy extended back many years, the claims covered long periods.

The Clayton Act contains a 4-year statute of limitations and the defendants promptly invoked its refuge. However, the appellate federal courts held that the defendants' actions in concealing the violations constituted fraud and suspended the running of limitations upon equitable grounds. *Westinghouse Electric Corp.* v. *City of Burlington, Vt.*, 122 App. D. C. 65, 351 F. 2d 762 (1965); *See* "Fraudulent Concealment as Tolling the Anti-Trust Statute of Limitations," 36 Fordham Law Review 328, December 1967.

Following the *Glus Case, supra,* and fully recognizing the estoppel doctrine, this Court in *Kondo* v. *Katzenbach,* 123 App. D. C. 12, 17-18, 356 F. 2d 351 (1966), held that no action had been taken by the defendant to cause delay in bringing action, therefore there was no question of estoppel. Judge Wright's dissent contains a valuable discussion of estoppel.

A much quoted phrase of Justice Frankfurter seems to be highly appropriate in connection with estoppel in the case at bar. In *Holmberg* v. *Armbrecht,* 327 U. S. 392 (1946), he said (p. 397), "This equitable doctrine is read into every federal statute of limitations." In that case, limitation was asserted as barring suit against a stockholder of an insolvent bank who had concealed his ownership of the bank's shares. Holding the equities springing

from fraud require paramount consideration in applying limitations statutes, the Court reversed the Court of Appeals which had applied the New York State statute of limitations. It is clear that estoppel is another "equitable doctrine" read into every federal statute of limitations. *Public Service Co. of New Mexico* v. *General Electric Co.*, 315 F. 2d 306, 311 (10th Cir. 1963), *cert. denied* 374 U. S. 809 (1963).

This delay on the promise of an amicable settlement has been fully recognized as ground for suspending the statutory bar. Closely parallel to our fact situation is *Longo* v. *Pittsburgh & Lake Erie R. Co.* 355 F. 2d 443 (3rd Cir. 1966) where a suit under the Federal Employers' Liability Act was dismissed as barred by limitations. The Railroad claim agent had assured the plaintiff his claim would be settled and requested him not to sue. The Court of Appeals reversed the dismissal, holding the plaintiff was entitled to a jury finding on the question of estoppel against the defendant by the conduct of its agent.

The same estoppel rule was applied to extend the limitation period where the defendant's insurance adjuster had lulled the plaintiff into a false sense of security, promising settlement, and the one-year Massachusetts statute of limitations on personal injuries had run. *Bergeron* v. *Mansour*, 152 F.2d 27, 30 (1st Cir. 1946). Accord: *Scarborough* v. *Atlantic Coastline R. Co.*, 190 F. 2d 935, 941 (4th Cir. 1951).

The Supreme Court language in *Thompson* v. *Phenix Insurance Co.*, 136 U. S. 287, 299 (1890), is particularly on the point. The insurance company was held to be estopped to plead limitations where its agents had assured the claimant they would "undoubtedly pay the loss claimed," and he therefore did not file suit within the limited time. Citing *Mickey* v. *Burlington Insurance Co.*, 35 Iowa 174, 180, Justice Harlan said for the Court:

> (p. 299) In the case last cited, it was properly said that it would be contrary to justice for the insurance

> company *to hold out the hope of an amicable adjustment of the loss,* and *thus delay* the action of the insured, and *then be permitted to plead this very delay,* caused by its course of conduct, *as a defense to the action when brought.* (italics supplied)

The *Glus Case, supra,* and the *Fontana Case, supra,* by this Court, applied the maxim that "no man may take advantage of his own wrong." To follow the decision here under review would be to authorize the exact opposite—in asserting limitations, he may take advantage of any wrong, so long as it's not in writing.

Statutes of limitation are designed to assure fairness to defendants, not to permit them to profit from their own wrong. *Burnett* v. *New York Central Ry. Co.,* 380 U. S. 424, 428 (1965); *Belton* v. *Traynor,* 381 F. 2d 82, 87 (4th Cir. 1967).

It is submitted the jury verdict fully and finally established that plaintiff Brown delayed filing suit as a result of "affirmative inducement" by defendants, and so was lulled into inaction. The jury plainly found defendants estopped to rely on limitations and there is no basis in law for the judgment n.o.v.

(a) D. C. Code § 28-3504 (1967) Does Not Modify the Doctrine of Equitable Estoppel or Limit Its Application to Written Instruments.

It seems clear that the trial court in the case at bar has misconstrued and misapplied the local statute requiring a written instrument in connection with agreements to delay the expiration of the limitation period or revive a barred agreement. The District of Columbia statute is obviously patterned after Lord Tenterden's Act, 1828, 9 Geo. 4 c. 14, sec. 1-3, the first statute to require a written instrument to evidence an acknowledgment or new promise with respect to an agreement that had been or would be barred by

limitations.[4] The effect of the "acknowledgment or new promise" is to revive the original contract or its vitality, without special consideration, and extend it for an additional period of the same length as provided in the original agreement. This is well illustrated by a case cited by the trial court, *Moore* v. *Snider,* 71 App. D. C. 293, 109 F. 2d 840 (1940), where a written instrument was relied upon to revive a debt which had been barred by the statute of limitations. The court held that even though there was an acknowledgment that the debt existed it did not on its face constitute such an unconditional promise to pay as would revive the debt; and there were questions of fact to be settled which made a judgment on the pleadings improper. *Williston On Contracts* (3d ed., 1957) sec. 164; *Noel* v. *Baskin,* 76 App. D. C. 332, 131 F. 2d 231 (1942).

In fact the trial court in the case under review did instruct the jury that the acknowledgment or new promise would apply "after the Statute of Limitations had run" to avoid the bar, but that estoppel would arise from "affirmative inducement" offered by the defense "before the limitation period had expired" (Tr. 1310 JA 64).

It is submitted the trial judge correctly treated the doctrine of estoppel as an independent rule of law in her in-

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[4] See "Developments in the Law—Statutes of Limitations", 63 Harvard Law Review 1177, 1254, 1256, n. 653 (1950).

p. 1254: "C. *Revival of Cause of Action*

In General.—It has long been recognized that the expiration of the statutory period does not bar the claim if the plaintiff can prove an acknowledgment, a new promise or part payment made by the defendant either before or after the statute has run. Unlike other actions of the defendant which will postpone or suspend the running of the statute, such conduct revives the cause of action so that the statute starts to run again for the full statutory period. * * *"

p. 1256: "Formal Requirements.—As necessary safeguards against the extension of the doctrine of revival to situations where the evidentiary and repose policies of the statute are not satisfied, the courts have required that an acknowledgment meet various formal qualifications. Although there was no requirement of a writing at common law, most states now have statutes requiring acknowledgments and new promises to be in writing, with a proviso that the effect of part payment is not to be altered."

structions to the jury. Clearly it is not altered or modified as an equitable principle by the D. C. Code section cited.

(b) Pendency of a Timely Action in Ohio for the Same Fee Suspended the D. C. Statute of Limitations.

From an equitable standpoint it should be noted that the great delay in adjudication of this matter is attributable to the defendants' tactics. While they refer to the Ohio suit by plaintiff as being timely filed (Def. Exh. 5, Tr. 877), they have objected there, as they do in this jurisdiction, to service upon the defendant corporation, claiming it must be sued in Pennsylvania where it was chartered. At the very outset that suit was dismissed by the Ohio court, and on appeal reinstated. The Ohio Court of Appeals opinion, *Brown* v. *Lamb,* 112 O. App. 116, 171 N.E. 2d 191 (1960) is reproduced in Appendix B of this brief, showing the defendants here were denied review in the Ohio Supreme Court as late as October 13, 1960.

Exhibits 32 (a) through (l), the correspondence between Brown and Lamb (JA 88-101) clearly show that Lamb was in Toledo, Ohio, after the conclusion of his F.C.C. matters and not in Washington, saying in Exhibit 32I (JA 98), "I do not get to Washington as often as I would like."

While this case has been pending in the District of Columbia, defendants have sought to have the Ohio suit dismissed for want of prosecution. At one time a District of Columbia judge ruled, on defendants' motion, that this suit in the District of Columbia would be dismissed unless plaintiff dismissed the Ohio suit. That order was changed when the Court was told defendants were moving to dismiss in the District of Columbia due to the pendency of the suit in Ohio; and moving to dismiss the Ohio suit for want of prosecution. *Brown offered in open court to dismiss the Ohio case if defendants would forego the claim of limitations in the District of Columbia, but they did not accept.* The District Court ordered the case to trial. (Transcript of that proceeding is attached in Appendix C of this brief.)

Next, defendants moved to dismiss the Ohio suit, telling that Court the case would be tried in the District of Columbia, and *saying the District Court had held that limitations had not run.* (Certified copy of that Motion and Supporting Brief dated August 11, 1967, are attached in Appendix D of this brief).

After the verdict in this case and the order of the trial court below entering judgment n.o.v. and granting defendants a new trial, another motion was made by them to have the Ohio suit dismissed for want of prosecution. However, the Ohio Court, being informed that the decision under review here was based upon limitations and not on the merits, has ordered the case to remain on the inactive calendar pending this Court's disposition of this appeal. (Letter from Judge George N. Kiroff to Attorney Farber dated January 29, 1968, is reproduced in Appendix E of this brief.)

The defendants seek to force this plaintiff to litigate in Ohio, and then split the case to sue the corporation in Pennsylvania, where it will plead limitations. Plaintiff would have to take all witnesses to Ohio, and then repeat the performance in Pennsylvania, freighting the 50-plus volumes of the F.C.C. hearing testimony and exhibits to both States through two extended trials, and two appeals, if indeed their dilatory tactics can ever be brought to trial.

The contract between the parties is a District of Columbia contract, largely performed in the District of Columbia, where most of the witnesses who know of plaintiff's performance are available, and where all of the official records of the Federal Communications Commission proceedings are located. Here the plaintiff represented these defendants over a period of three years, in the Court below, as well as this Court. It is submitted that this case has been long enough awaiting adjudication. It can and should be completed here at this time.

In *Burnett* v. *New York Central Ry. Co.*, 380 U. S. 424 (1965), the Court held that the timely filing and pendency of a State Court action under the Federal Employers' Liability Act suspended the running of the statute of limitations on the ground that a case is "commenced" when it is filed in the State court even if that court cannot render judgment. *Herb* v. *Pitcairn*, 325 U. S. 77 (1945). *Berry* v. *Pacific Sportfishing, Inc.*, 372 F. 2d 213, 215 (9th Cir. 1967). The Court's decision in *Holmberg* v. *Armbrecht*, 327 U. S. 392 (1946), highlights the philosophy back of the ruling, because a defendant is aware by such State Court action that he is being held to answer and he can claim no prejudice from the delay.

In *Godlawr, Inc.* v. *Heiman*, 369 U. S. 463, 467 (1962), the Court noted that the dismissal for improper venue would have caused plaintiff to lose a substantial part of the cause of action due to the statute of limitations. Reversing that order, Justice Black spoke of the enlightened objective to avoid such "time-consuming and justice-defeating technicalities."

This suit was filed in May of 1963, and did not reach trial until October, 1967—almost 4½ years later. Who wouldn't seek to avoid that kind of delay? and the expense! and still it goes on. Certainly the prospect of settlement motivates the conduct of every legal controversy, and the cases cited herein well recognize the "affirmative inducement" involved in such a promise.

A fortiori is this true of a lawyer and the great reluctance of this profession to sue a client. Canon 14, Professional Ethics, (Appendix A, *infra*) was adopted sixty years ago, in 1908, by the American Bar Association:

> . . . lawsuits with clients should be resorted to only to prevent injustice, imposition or fraud.

When a client pleads for time to bring order into his affairs, and dispose of pending business of the highest

importance—time to raise money, and time to rehabilitate his personal and business reputation which had been under attack, and which the attorney had helped him defend—when he asks the attorney not to sue and promises a satisfactory settlement will be worked out—that client should be estopped to take advantage of his lawyer's delay in filing suit. The defense of limitations should not be available to him.

The Ohio suit is still pending, lo! ten years after it was filed. On the direct authority of *Burnett* v. *New York Central Ry. Co., supra,* it seems clear the statute of limitations was tolled by the filing of the State Court suit in Ohio. But even without that effect, the estoppel is established by the jury verdict.

II. THE COURT ERRED IN ORDERING A NEW TRIAL FOR EXCESSIVENESS OF THE VERDICT DUE TO JURY PREJUDICE ARISING FROM COUNSEL'S SUMMATION, BECAUSE:

(a) the argument was addressed to the issues, and based upon the evidence;

(b) there was no objection to the argument;

(c) counsel expressly disavowed any prejudicial significance;

(d) the court's instructions were curative.

As an alternative to the judgment n.o.v. which may be reversed, the court conditionally ordered a new trial "on the ground that the verdicts are excessive and that the manner in which plaintiff presented his case was such as to prejudice the jury against the defendants." (JA 16) A footnote to the order, quotes from counsel's summation to the jury, referring to a book written by defendant Lamb, "The Planned Economy in Soviet Russia" which was an important factor and much in controversy before the F.C.C. Some of the crucial language appears on page 190 of that book, in evidence as plaintiff's Exhibit 6 (JA 69).

> "If the American planned economy is to be achieved, it becomes evident that those who produce, the workers

> and farmers, and those who defend, i.e., the militiamen, through joint action and organization, shortly must assume title to the means of production."

That is the language read to the jury by counsel in final argument; and he characterized that language as a call for "overthrow of this Government" (footnote 4, order for judgment n.o.v. and for new trial. JA 17).

Counsel also referred to an article in The Sunday Worker signed by Edward Lamb (Pl. Exh. 12, Tr. 180-181) which starts:

> "Lenin and Sun Yat Sen, * * * how wonderful it would be to visit the immortal Bolshevik leader during these days of the triumphant progress of Socialism in the U.S.S.R.! And who would not sit at the feet of China's first republican president and listen to him again say: 'China, work with the Soviets!' "

Counsel's argument, quoted by the trial judge, also referred to evidence that Lamb had been listed as counsel for the International Labor Defense (I.L.D.) (Pl. Exh. 48, FCC Exh. 39A, Tr. 682; Pl. Exh. 52, FCC Exh. 39N, Tr. 689), and that a Congressional document had called that organization, "the legal arm of the Communist Party." (House Report 1115, Pl. Exh. 71, FCC Exh. 98-G, Tr. 775)

It is submitted there was nothing improperly prejudicial in this argument; the whole F.C.C. proceeding involved charges that Lamb had in fact been a member of the Communist Party (McFarland Letter, Pl. Exh. 17, JA 70), and the Broadcast Bureau had argued that this book advocated a change of title to the means of production "apparently by violence, if necessary." (Initial Decision, Pl. Exh. 28, p. 87, par. 131).

Counsel did not continue the quotation from Lamb's book on Russia, which was in evidence below (Pl. Exh. 6, JA 69), but the Broadcast Bureau had done so, and the

Initial Decision (Pl. Exh. 28, p. 87) quotes the sentence following the language above.

> "Have the masses acquired a degree of enlightenment *sufficient to overthrow the historical but outworn theological, nationalistic, social and economic dogmas?*" (italics supplied)

The book in question was a major focus of the attack upon Lamb before the Hearing Examiner and a major portion of plaintiff attorney's efforts was devoted to eliminating the subversive attributes sought to be given it by the Broadcast Bureau. Certainly that kind of language is open to argument such as was attached by the F.C.C. representatives, and it had to be met and refuted, as it eventually was (Pl. Exh. 27).

Now, in evaluating the attorney's services it does seem within the ambit of fair argument to tell the jury that plaintiff attorney had taken on a big assignment, and a difficult one, to prove that language was not an advocacy of Communism.

The entire case involved the charges of Communism and Brown's able defense. **No suggestion was made that the** charges were true—in fact, that was expressly and specifically disowned (even though there was no objection) by plaintiff's senior counsel (Supplemental Tr.).

Mr. Hayes: (following preliminary remarks)

> Now, ladies and gentlemen, there has been evidence on the stand tending to show that certain things were charged against Mr. Lamb. It is not my purpose, and I don't pretend, to think that Mr. Lamb was a Communist or anything else, but I say to you, ladies and gentlemen, that he faced charges, severe charges.

That was said in the rebuttal argument—the last word the jury heard from the plaintiff's side before it retired. Counsel made no objection and the Court offered no admonition.

As a matter of fact, the record shows that defendants expressly agreed to the admission of each F.C.C. exhibit, just so long as they were shown the material had been received in that proceeding. Under the circumstances, accepted principles of trial practice would require disregarding any complaint after verdict.

Fair appraisal will show this argument was not inflammatory but perfectly reasonable, even necessary, to show the jury what the plaintiff attorney had done. He testified each document required very careful study and evaluation to determine its effect, and he had to spend considerable time in this effort (Tr. 663). Each exhibit frequently had several pages, and he estimated there were several hundred documents in the entire record (Tr. 662). There is nothing of any kind in the record to show it improperly affected the jury, and the trial judge's suggestion to that effect seems to be purely speculative.

It couldn't have unfairly prejudiced Lamb as shown by the last sentence quoted from counsel's argument by the trial judge. He said the plaintiff attorney had done a fine job: "This is the type of evidence that Russell Morton Brown had to overcome." Clearly it was fair argument, sound argument, and it plainly said the charges themselves had been "overcome."

Even so, the court took special pains to instruct the jury correctly:

> (Tr. 1289) At the conclusion of the trial each attorney has the right to make to you what is called a closing argument, and sometimes these arguments are helpful to the jury in marshalling the facts. However, what the attorneys say to you, what they have included in their questions, what they have argued to you, is not evidence in the case.
>
> * * *
>
> (Tr. 1295) When Mr. Brown was testifying he identified various papers as exhibits, which are documents which the Government used against Mr. Lamb in the

> proceedings before the Federal Communications Commission. This was permitted by the court for the purpose of enabling Mr. Brown to indicate to the jury the nature of the allegations which he, and any others defending Mr. Lamb and Dispatch, Inc., had to meet. You are to understand that *none of the exhibits just referred to were admitted to prove the truth of any statements in them, but only for the limited purpose which I have indicated.*
>
> Moreover, you are told this: *You are not to concern yourselves with the question of whether there was or was not Communist activity on Mr. Lamb's part.* The reason for that is simply that you are not called upon to decide any such question. *Neither are you to be prejudiced against Mr. Lamb because of the mentioned allegations concerning him.* (italics supplied)

It is particularly notable that the entire argument was addressed solely to the evidence in the case and did not exceed the scope of the issues before the court in any way. As to the propriety of the argument and the method of presenting the case, the same question was considered in *Dunlop* v. *U. S.*, 165 U. S. 486, 498 (1897) where the prosecutor had used extravagant demunciations in argument. On objection the court held it improper, and the District Attorney withdrew his remarks. The Supreme Court said:

> (498) the action of the court was commendable in this particular, and we think this ruling, and the immediate withdrawal of the remark by the district attorney, condoned his error in making it, if his remark could be deemed a prejudicial error. There is no doubt that, in the heat of argument, counsel do occasionally make remarks that are not justified by the testimony, and which are, or may be prejudicial to the accused. In such cases, however, if the court interfere, and counsel promptly withdraw the remark, the error will generally be deemed to be cured. If every remark made by counsel outside of the testimony were ground for a reversal, comparatively few verdicts would stand, since in the ardor of advocacy and in the excitement of trial, even the most experienced counsel are occasionally carried away by this temptation.

No sign of jury prejudice is to be found in the record. The verdict was large, but in view of the record it was fully supported, as the discussion below indicates. It is only the argument of counsel and other unspecified references to Lamb's alleged Communist activities, which are said to warrant a new trial. But in *Uhl* v. *Echols Transfer Co.,* 238 F. 2d 760, 765 (5th Cir. 1956), the Court declined to reverse an order *denying* a new trial because of inadequate verdict attributed to improper argument. The Court said (p. 765) there must be an objection to the argument, it must be unwarranted by the pleadings and the evidence, have a tendency to mislead or prejudice the jury, and be to some extent approved by the judge. Since none of those elements was present, the Court held the alleged inadequacy of the verdict was simply a non-sequitur.

That seems to be essentially the same rule followed by this Court in *Washington Times Co.* v. *Bonner,* 66 App. D.C. 280, 292-3 86 F. 2d 836 (1936).

That is exactly the case at bar: there was no objection to the argument; it was addressed directly to the evidence; and it couldn't possibly mislead the jury, especially in view of the disavowal by counsel and the court's curative instructions. The Fifth Circuit, by Chief Judge Hutcheson, announced the thoroughly sound rule in the *Uhl Case, supra,* holding there was no prejudice from such argument, and affirming a judgment on the verdict (p. 765):

> When it comes to the final assaying of the substance and effect of the evidence, a matter which under the genius of our institutions is primarily for the trial court, we are convinced that his refusal of the motion for new trial for the reasons that he gave was not an abuse but the correct use of his discretion. Indeed, we think that to have held otherwise than he did would have *constituted an invasion of the province of the jury with respect to matters which the law leaves exclusively to it.* (italics added)

This Court has followed the same rule in declining to disturb a verdict simply because it seemed to be small. "It would be an unwarranted encroachment upon the province of the jury, as well as of the trial court." *Frasca* v. *Howell,* 87 App. D.C. 52, 182 F. 2d 703 (1950).

It seems clear the argument was within the issues and addressed to the evidence, and the trial judge erred in attributing excess of the verdict to this cause.

A) The Verdict Is Fully Supported by the Evidence.

As ground for the grant of a new trial, the trial judge recited only that the verdict is "excessive". No standard is offered or suggested by which it may be known how this conclusion is reached. There is no analysis of the evidence, no finding that the verdict is without support.

As a matter of fact, the evidence overwhelmingly supports the verdict, and it cannot be "excessive in law". *Massachusetts Bonding and Insurance Co.* v. *Abbott,* 287 F.2d 547, 548 (5th Cir. 1961). It is submitted the order for new trial is in error and denies plaintiff the constitutional right to the jury's finding. The record is convincing.

(1) Plaintiff's Services Preserved for the Defendants a Television Broadcasting License Worth at Least 6 Million Dollars.

One gauge as to value of the property in issue may be found in defendant Lamb's book, "No Lamb For Slaughter" (Harcourt, Brace & World, Inc., N.Y., 1963) (Pl. Exh. 4). He says:

> (p. 207) *The Erie television station, WICU, which was a casus belli in the (p. 208) FCC witch hunt against me in the mid-1950's, has been a gold mine.* I spent about $400,000 to put it into operation in 1949. Radio men told me that I was a fool, that a smallish factory city like Erie never would support an expensive new TV outlet. *For several years straight this property earned almost $1 million a year. Within*

> *two or three years I received offers indicating that the property was worth many, many millions of dollars.* (italics supplied)

This comports with plaintiff Brown's testimony (Tr. 803-804) that just before the F.C.C. hearings began on September 15, 1954, J. Howard McGrath told Lamb that the station could be sold for $5 million and recommended its consideration. Lamb objected because the station was worth more money, saying (Tr. 804), "Well, it makes a million dollars a year."

Lamb himself acknowledged this on the witness stand (Tr. 65):

> "I believe that I have said that WICU-TV and the radio that shared in that, was a very profitable station, and made a million dollars a year before taxes."

Lamb was not clear in his recollection of a conversation with Freeman Lincoln, one of the editors of Fortune Magazine, reported in Fortune of May, 1956, (Tr. 61) and quoting him as saying the station was worth $6 million (Tr. 63). However, he acknowledged he may have said it was worth that much (Tr. 64).

A professional valuation of Station WICU was received in evidence from William T. Stubblefield, a broker of radio and television stations, as well as newspapers (Tr. 760-765), throughout the country. As of June, 1957 (Tr. 763)[5], this witness said WICU-TV "would have brought a price between six and eight million dollars at that date in that year" (Tr. 764). He explained the range as depending upon the terms of the sale, as cash or deferred payments (Tr. 764-765).

It is important on this issue that the trial judge refused to allow plaintiff to show that Lamb also owned the cor-

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[5] The trial court limited the testimony of this witness to the time of June, 1957, on the ground that was the date when plaintiff completed the work in question (Tr. 759), excluding evidence of subsequent increase in value to the date of trial.

porations holding F.C.C. broadcast licenses at Orlando, Florida (WHOO) and at Toledo, Ohio (WTOD) (Tr. 748-753). Applications before the F.C.C. for approval of sales of those facilities had been declined by the Commission pending resolution of the hearing on WICU-TV (Pl. Exh. 18, JA 74). It was thought at the trial, and it seems now in perspective, that these were additional values hanging on the outcome of the WICU-TV matter being handled by plaintiff Brown. They had a distinct bearing in enhancing the value of his services under accepted standards of measurement.

The Initial Decision of the F.C.C. Hearing Examiner (Pl. Exh. 28), dated December 7, 1955, comprises 140 pages of analysis and evaluation of the 7,000 page record (id. p. 8, par. 10) and the numerous exhibits offered by both sides. On page 12, paragraph 19, this Decision lists the Lamb licenses including WTOD, Toledo; WIKK and WICU-TV, Erie, WHOO (AM and FM) Orlando, Florida; and WMAC and WMAC-TV, Massillon-Canton, Ohio. This Initial Decision fully summarizes the facts before the Commission and provides an impartial analysis of the evidence and the issues. Any fair reading of this Decision, later affirmed on appeal by a divided Commission on June 15, 1957,[6] will readily show how well appellees were represented in the acceptance of counsel's arguments by the Hearing Examiner.

Herbert Sharfman, the Examiner, testified in the trial court below as to the performance by Brown in behalf of defendants (Tr. 964). Three witnesses recanted their testimony and he assumed that was due in "large part at least," to Mr. Brown's cross-examination.[7]

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[6] Pl. Exh. 70. Commissioner Doerfer abstained; Commissioner Lee dissented.

[7] One of those who so recanted was Marie Natvig, later convicted of perjury in this connection. The conviction was affirmed by this Court. *Natvig* v. *United States*, 98 App. D.C. 399, 236 F. 2d 694 (1956), *cert. denied* 352 U.S. 1014 (1957).

He recalled that during the trial (Tr. 965), "I paid tribute to Mr. Brown's quality as a counsel and I said that I did not think that anybody could have represented his client in a better fashion than Mr. Brown did." He said he had been with the F.C.C. for 21 years, and had dealt with "innumerable licenses" "at least in the hundreds, and perhaps verging in the thousands * * *" (Tr. 969-970). This recognition from the Examiner was quoted with pictures of Lamb, Brown, McGrath and Sharfman, in Lamb's newspaper, the Erie Dispatch (Pl. Exh. 13). It should offer some gauge of the plaintiff's performance to measure against the term "excessive" as applied to the jury verdict.

Examiner Sharfman explained that when a license has been denied, the former owner cannot sell it because the license itself is not subject to sale (Tr. 970). The only asset remaining to the former licensee "is the physical assets of the station." (Tr. 971)

Clear as crystal is the conclusion that if Lamb were found to have sworn falsely in securing any of the licenses named, then he would be legally deemed not qualified to hold a communications license of any kind under the Commission. It follows that he would have lost not only WICU-TV but every other one enumerated in the Initial Decision quoted above. While the trial judge restricted the evidence before the jury to a consideration of station WICU-TV at Erie, this Court need not be so confined in passing upon the alleged "excessive" character of the verdict.

In sustaining the Commission's power to deny a license on the basis of character shown by misrepresentation, Mr. Justice Jackson said for the Court, "The fact of concealment may be more significant than the facts concealed." *Federal Communications Commission* v. *WOKO,* 329 U.S. 223, at 327 (1946). It is clear that Lamb's character

qualifications were at issue in the proceeding and the future of every license he held hung in the balance.

However, independently of these other licenses, it is clear that WICU had a fair value in 1957 of not less than 6 million dollars.

(2) The Work Done Was Voluminous, Extending Over 3,000 Hours and Covering 7,000 Pages of Record.

With respect to the actual services performed by the plaintiff and justification for the bills rendered to the defendants, plaintiff Brown testified in person (Tr. 806). When the McFarland letter was first given to him, setting forth the charges before the F. C. C., Lamb made it plain that he would lose not only WICU but every other communications license he had. In commendable terms he told Brown his reputation was worth more than money to him and to his family. (Tr. 806)

As he does in "No Lamb For Slaughter" (Pl. Exh. 4), at pages 135-136, Lamb referred to the danger of prosecution for perjury (Tr. 468), drawing a parallel with the Alger Hiss case, and saying this was dangerous (Tr. 808).[8]

When the subject of Brown's compensation was brought up, "Mr. Lamb at that time emphasized again that he was in the fight with everything he had in the whole world and that he didn't intend to count pennies to save his reputation" (Tr. 807).

This is parallel to Lamb's own version in "No Lamb For Slaughter" (Pl. Exh. 4, p. 132),

> "Thereafter the F.C.C. magnanimously said that I could try to 'disprove the charges.' That's quite a

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[8] A more pertinent reference would be found in Section 1001 of the Criminal Code, Title 18 U. S. Code, § 1001, 62 Stat. 747, making it a felony to make "any false, fictitious or fraudulent statements or representations" * * * "in any matter within the jurisdiction of any department or agency of the United States * * *, punishable by fine up to $10,000 or imprisonment up to five years, or both." (Appendix A, *infra*).

trick—proving a negative. But I set out to do it, *if it took my last penny.*" (italics supplied)

On the contrary, if the case should be lost, Lamb said there would be repeated appeals and "it would have been a terribly thin time to get anything—any money for this case" (Tr. 815). The plain import of these conversations is that the fixing of the fee should await conclusion of the work, and see the results, and so it did.

In sound lawyer-like fashion, Brown had raised a constitutional law defense to the F.C.C. procedure, claiming a violation of the statute in placing the burden of proof on Lamb. Requiring him to show he had not sworn falsely, they were denying him due process of law. Suit to enjoin the Commission was brought in the District Court (Pl. Exh. 20, Tr. 484), and when that court held the suit premature because the administrative remedy had not been exhausted, this Court affirmed. *Lamb* v. *Hyde,* 96 App. D.C. 181, 223 F. 2d 646 (1955). Brown did all the work in the District Court (Tr. 484, 488), and in this Court on appeal (Pl. Exh. 22). The Government was represented below by United States Attorney (now District Judge) Oliver Gasch.

Brown explained (Tr. 494) the real purpose of the District Court suit was to pressure the Commission to take action one way or the other, since Mr. Lamb had complained so about the damaging effects of delay (Tr. 491-492). The very day the District Court suit was set down for argument, Commission Counsel delivered to Brown an Order for hearing on the matters set forth in the McFarland Letter (Tr. 494).

By the time the matter was heard in this Court, the F.C.C. hearing was almost over, and Brown followed the matter to a conclusion so that all constitutional rights of the defendants would be fully protected in the event of an adverse decision (Tr. 498).

Plaintiff had filed in the papers, at the behest of defendant's a statement detailing the various activities involved

in defending Lamb and his corporation (Pl. Exh. 77; Tr. 956-959). This showed travel by plaintiff Brown to Toledo, Ohio; Detroit, Michigan; and New York City, interviewing possible witnesses in an effort to develop defense material. It told of travel to Florida to interview Marie Natvig, the F.C.C. witness who later recanted her testimony and was subsequently convicted of perjury in the District Court.[9]

It showed that plaintiff also went to the home of another adverse witness, Clark Widemann, in Columbus, Ohio, who returned to the witness stand and said his testimony was incomplete, possibly in error. The Washington Attorney, Joseph Leo McGroary, also testified to being with Brown through an entire night in his office while he interviewed a Government witness, Lowell Watson (Tr. 990). Brown put Watson on the witness stand that very morning and he absolved Lamb of the specific wrongs he had previously asserted (Pl. Exh. 77). Three witnesses were thus led to retract their damaging testimony.

The massive paper work involved will be apparent from the mere size of the transcript at 7,000 pages (Initial Decision, p. 8, par. 10; Pl. Exh. 28); the Broadcast Bureau's Proposed Findings against these defendants totaling 335 pages (Pl. Exh. 26); and Brown's able and vigorous refutation line-by-line running 115 pages (Pl. Exh. 27).

Plaintiff indicated the time involved was over 3,000 hours, including many meetings with named witnesses who played a part in the case, some who testified and others who did not. He was required to make a general study of the literature on Communism and reports on the subject by Government agencies.

Foundation was laid for court action which would be necessary in the event that the administrative decision should be adverse (Tr. 956-959).

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[9] This Court affirmed that judgment, *Natvig* v. *United States*, 98 App. D.C. 399, 236 F. 2d 694 (1956), *cert. denied*, 352 U.S. 1014 (1957).

Plaintiff's background provided singular qualification for the assignment in question; he had both administrative and trial experience over many years. After pre-law studies at Brown University, practically his entire adult life has been spent in Washington legal circles, from law school days at Georgetown, where he received the Juris Doctor degree, and was admitted to the Bar of this Court in 1937, the United States Supreme Court in 1942, and the Supreme Court of Texas in 1946.

Beginning his career in the Department of Justice under Attorney General Homer Cummings in 1938, he worked with the late Robert H. Jackson when he was Solicitor General on Supreme Court cases (Tr. 434). He represented the Attorney General in the *Tidelands Oil Case* in Texas in 1940 (Tr. 435), and entered the Navy as a Lieutenant (jg) under the Judge Advocate General. He was legal officer on Navy construction contracts for $125 million at Corpus Christi, Texas. Subsequently, he represented the Navy and Marine Corps in legal matters in the District of Columbia, in North Carolina, South Carolina, Georgia, and at several places in Michigan (Tr. 437).

At the direction of the Secretary of the Navy he conducted the defense of several General Courts Martial growing out of a post-exchange shortage of several hundred thousand dollars (Tr. 438).

Returning from the war as a Lieutenant Commander in 1946 (Tr. 440), Brown went back to Texas where he had entered the Navy, and began private practice, but returned to Washington following a serious automobile accident (Tr. 438-439).

He was appointed Chief of the Claims and Litigation Section in the Chief Counsel's Office, Bureau of Federal Supply, Treasury Department, and helped transfer this organization to the newly created General Services Administration in 1949 (Tr. 439).

About that time, J. Howard McGrath, a long-time friend, former Governor of Rhode Island, had come to Washington as Solicitor General. He then became United States Senator and in 1949 was appointed Attorney General. When a Congressional Committee was investigating the Department of Justice, Brown accompanied McGrath as his counsel, and friend, and they subsequently entered into an association for the practice of law under the firm name of McGrath and Brown (Tr. 439-440).

Among other published works, Brown had initiated a study of the role of labor in war-time, published as a leading article in the Harvard Law Review, November 1940, as his joint effort with two Department of Justice colleagues (Pl. Exh. 33, Tr. 441). He has lectured on Supreme Court practice at George Washington University Law School, and at the University of Toledo Law School, where he received a certificate as Distinguished Law Week Lecturer (Pl. Exh. 34, Tr. 442-443).

Brown's analysis of his bills to these defendants is in the terms of Canon 12 of the Professional Ethics (App. A, p. a2, infra).

The difficulty, novelty and complexity of the case must be considered. This kind of question had never before been raised by the F. C. C., nor had any other Government agency made property rights worth millions of dollars, depend upon association with subversive organizations (Tr. 813).

He secured rulings to "keep out all of the hearsay evidence the F. C. C. was trying to introduce against Mr. Lamb" (Tr. 814),[10] outlined the details of his performance, and clearly spelled out an eminently sensible analysis of

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10 *Bridges* v. *Wixon*, 326 U.S. 135, 154-155 (1945), invalidating a deportation order based on hearsay, holds that where basic liberties are involved, "the essential rules of evidence" should be applied in administrative proceedings. Such was the guiding rule adopted by the Hearing Examiner for the first time in an F.C.C. proceeding.

the $500,000 in fees for which he had originally billed the defendants.

(Tr. 814) He had complete responsibility alone for direction of the case, conduct of the hearings, examination and cross-examination of witnesses, briefing all law points before the Commission, the District Court and the Court of Appeals, preparation of every legal document introduced for the applicant, and reading the full evidence day by day.

This lasted far into the nights, past midnight, and he had little sleep, sometimes none at all.

The result not only saved the property, but avoided the matter's being sent to the Department of Justice for study of possible criminal prosecution.

If the station was worth $5 million, as a minimum figure discussed, then 10% of that value seemed fair and reasonable.

On assigning the 3,000 hours a value of $100 each, that would produce $300,000, and an "accomplishment fee" to represent the favorable result would be justified, bringing the total up to $500,000.

However, Brown disavowed the hourly rate approach except as a check on the reasonableness of the service, because Lamb had said that if he lost, it would be very difficult to get anything for the case, and they would be facing successive appeals.

Lamb was not a regular client, but returned to his old attorneys after this case was over. Brown had to give up all other business and make a "tremendous study" of the matters involved. There was much time out of the office, extended travel, and the benefits to the client had been very great (Tr. 815-816) in saving this five million dollar (or more) television station (Tr. 815-816).

(3) Expert Testimony of Practicing Attorneys Placed the Fair and Reasonable Value of Plaintiff's Services Much Higher Than the Jury Verdict.

Besides the testimony of Brown himself on the value of his services, plaintiff presented Attorney Milton Heller, a member of the D. C. Bar since 1958 (Tr. 972). This witness, also a member of the Maryland Bar, was a member and past-President of the Association of Plaintiff's Trial Attorneys, a member of the American Bar Association and the Federal Bar Association, familiar with standards used by attorneys to fix fees in the absence of a specific contract (Tr. 973, 983). He outlined the standards generally in terms of Canon 12, to which he referred (Tr. 973-974). On the basis of his knowledge of practice, discussions with other attorneys, attendance at seminars on charges and experience with the Covington and Burling firm, this witness answered a hypothetical question comprising matters of record (Tr. 977). He said the time involved of 3,000 hours, to which plaintiff Brown had testified, should be charged at a hundred dollars an hour, or a minimum of three hundred thousand dollars. Due to the "obvious tremendous economic benefit", there should be a higher charge ranging upward to seven hundred thousand dollars (Tr. 984).

Another D. C. attorney, Joseph Leo McGroary, testified for the plaintiff that he had practiced at the trial bar in this jurisdiction for thirty-three years, is also a member of the Virginia Bar (Tr. 985-986).

He first knew the plaintiff in the Navy in 1945, when he went to the Marine Corps station at Cherry Point, North Carolina, to defend a Major in a court-martial. Brown was a Lieutenant or Lieutenant Commander in the Navy on duty there. He testified to Brown's "excellent" reputation as a "rare trial lawyer", to whom he had turned over defense of the court-martial case in 1945 (Tr. 987-988).

He recounted that during the F.C.C. hearings, Brown had called him about midnight and asked him to come

downtown and be present while Brown interviewed a witness who had been called by the Government. He stayed throughout the interview all night in Brown's office (Tr. 989-990).

Regarding the standards used by attorneys in fixing fees in the absence of specific contract, he expressed a familiarity based on his years of practice, referring generally to the factors set forth in Canon 12 of the Professional Ethics (Tr. 990-991).

The witness was given the hypothetical question summarizing the matters of record (Tr. 991), and asked to state the "fair and reasonable charge" for the attorney's services (Tr. 995). He said "a reasonable fee should range from ten to twenty percent of six to eight million dollars (Tr. 996)."

Defendants sought to counterbalance this with D. C. Attorney Roger N. Robb who said *his firm* would charge a straight hourly rate of $35. per hour, to be billed monthly (Tr. 1243).

This witness did not address the particular case or its difficulty, the late hours, the loss of other engagements, the value of the results obtained. He assigned only an hourly rate for counsel's time—night or day, win or lose. This may do for carpenters or bricklayers, but it has little application to professional services.

Judge Woolsey in *Woodbury* v. *Andrew Jergens Co.*, 37 F.2d 749, 750 (S.D., N.Y. 1930), has been much quoted:

> (p. 750) The value of a lawyer's services is not measured by time or labor merely. The practice of law is an art in which success depends as much as in any other art on the application of imagination—and sometimes inspiration—to the subject matter.

Speaking of attorney's fees, Judge Holtzoff of our own District Court said, "It is not fair for anyone to attempt to fix them on an hourly or a daily basis." *Webster Motor*

Car Co. v. *Packard Motor Car Co.*, 166 F. Supp. 865 (D.C. D.C. 1955).

There was, moreover, in the case under review, certainly no provision or arrangement for monthly billing. As the record shows, and Brown testified, Lamb had expressly asked Brown to wait until the work was done. "How can we set a fee? They haven't even told us what I am charged with—they haven't even told us who the witnesses are, or what we are up against—we don't even know what our problems are (Tr. 465). * * * just win this case. You'll never have to worry about money" (Tr. 467) (Tr. 807), but if the case should be lost, he said, "it would have been a terribly thin time to get anything —any money for this case (Tr. 815)."

Certainly there was no monthly billing standard for comparison. Such a straight hourly rate would require a client who loses to pay just as much as one who wins; and an impoverished client to pay as much as a wealthy one (or else find other counsel).

A bird's-eye view of the record supports the jury verdict beyond question of a doubt:

(1) station WICU-TV valued at 6 million dollars.

(2) income annually ..... 1 million dollars.

(3) expert testimony:

Plaintiff's evidence	*Defendants' evidence*
Brown .. $500,000.	Robb ..... $105,000.
Heller .. $300,000 to $ 700,000.	(3,000 hours at $35. each, billed
McGroary $600,000 to $1,200,000.	monthly)

The jury was amply justified in the verdict totaling $400,000. Any claim that it is excessive is not based on the evidence. The trial judge plainly trenched on the jury's exclusive function in ordering a new trial.

(4) Objective Standards Show the Fee Was Not Excessive.

(a) *Lamb himself reports he received substantially higher fees for less work.*

It is, of course, difficult to arrive at a fee by objective standards, but we are not without some fluttering flags for guidance. Defendant Lamb's book (Pl. Exh. 4), "No Lamb For Slaughter", is helpful.

> (p. 206) "But in the depression years of the 1930's *it was solely fees for legal work that brought me money,* not investments or deals. Some people look incredulous when I tell them that during the 1930's, as a young lawyer who was giving away much of his time to labor unions and social causes, I still managed to collect fees running into six figures in most years. *In each of two years of that depression decade, the increase in my assets came to more than a million dollars.*" (italics supplied)

With direct pertinence to the importance and value of the favorable result produced by plaintiff Brown before the F.C.C., Lamb's book continues a tale of blue chip investments:

> (p. 207) "As a result, by the end of World War II my holdings in securities and marketable real estate were worth at least $3 million. *My broadcasting venture right after the war just about trebled that.*" (italics supplied)

When he was on the charging end of the lawyer's bills, instead of the paying end, this defendant mastered his role with singular aplomb. His same book relates (p. 95) one of his court appearances where two young lawyers had brought a stockholder's suit against General Motors, and recovered a verdict over $6 million. "The nervous young law partners wanted to settle the case for four million dollars." But Lamb, with an associate, objected. "After a day's argument" the court approved a settlement at $4,500,000, attributing the increase to Lamb's efforts.

(id. p. 95-96) For their services in securing this result, the trial court awarded the young lawyers fees of $490,000.

(id. p. 95) The "day's argument" put in by Lamb and his colleagues brought them an award of $45,000. "And there were additional payments to the other attorneys."

It may fairly be wondered with what poor grace can this defendant, who valued his good name above money, now be heard to contend this jury verdict is excessive? His own language in the same book says he was told by the F.C.C. to disprove the charges. "But I set out to do it if it took my last penny." (id. p. 132)

We might note that in the General Motors case mentioned, Lamb and his colleague were allotted 9% of the $500,000 increase attributed to their efforts, for one day's argument.

The young lawyers who would have settled for $4 million were awarded 12.25% of that sum.

The jury verdict here labeled "excessive' is a mere 6⅔% of the $6 million minimum valuation placed on the station in question ten years ago.

May it be noted here, too, that this takes no account of the value of the other facilities saved for Lamb by this decision in his favor. Nor does it in any way place a value on his freedom to apply for other additional F.C.C. licenses. It doesn't place a dollar value on his reputation for truth and veracity which was here so directly at issue,[11] nor on his freedom from possible criminal prosecution for false statements. Measured alone by the value of this one station WICU-TV, the verdict is in no sense excessive, but actually quite well within the evidence and within reason.

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[11] Examiner's Initial Decision (Pl. Exh. 28) p. 9, par. 12, recites: "* * * the present case is one of misrepresentation, pure and simple. * * * Issue No. 1 requires only that a determination be made of the *truth and veracity of Lamb's sworn statements* as set forth in the order and of the candor and completeness of those statements."

(b) *Statutory fees authorized by Congress represent higher percentages of the benefiits accomplished for the client.*

Without unduly laboring the point, authoritative guidance may be derived from legislative standards adopted by the Congress.

(1) *Attorneys for Indian tribes* conducting matters before the Indian Claims Commission may be awarded fees by the Commission up to *10% of the amount recovered,* in addition to disbursements. Title 25, U.S. Code, § 70n, August 13, 1946, 60 Stat. 1053.

(2) *Attorneys representing claimants* before the *Foreign Claims Settlement Commission* may be awarded attorney's fees up to *10% of the amount of the award.* Title 22 U.S. Code, § 1623, March 10, 1950, 64 Stat. 13, as amended.

(3) *The Federal Tort Claims Act* originally authorized allowance, by the court or federal agency closing a claim under the Act, of attorney's fees *up to 10% of the recovery* for matters *settled administratively,* and *up to 20% for cases disposed of through the District Court.* Title 28 U.S. Code, § 2678, June 25, 1948, 62 Stat. 984.

Those rates have been amended *now to fix 20%* as the maximum for matters settled out of court, and *25% for cases determined by litigation.* June 18, 1966, 80 Stat. 307.

Many examples could be found of statutory provision for fees in ranges comparable to those cited above, but those seem to be fairly representative of the general legislative pattern, and to that extent they are helpful as guideposts. With such a yardstick, it certainly seems wide of the mark to say the verdict before this Court is "excessive".

(c) *Fees allowed by judges in cases of comparable magnitude show the verdict was not excessive.*

Under some circumstances the judges themselves are called upon to fix the fees of attorneys, and they offer standards and guidance for this case. In *Cherner* v. *Transitron Electronic Corp.*, 221 F. Supp. 55, 62 (D. Mass. 1963), the court awarded a $200,000 fee to one group of attorneys who had brought to the corporate shareholders a settlement of $5,300,000 for false statements in a prospectus. The court expressly pointed out that the matter had been settled, and not tried (p. 59), and that, while more than 2,000 hours were involved, "most of the time was spent in investigation, research, and drafting, with only a few appearances in court to argue motions and like matters." (p. 62)

In addition, a fee of $65,000 was awarded to other counsel in the same case.

In *Simler* v. *Conner,* 352 F. 2d 138, 141 (10th Cir. 1965) *cert. denied,* 383 U.S. 928 (1966), the Court of Appeals affirmed a finding by the District Court that counsel should have a fee equal to 50% of the value of the property secured for his client in a will contest, subject to a reduction for co-counsel fees making the actual judgment 36% of the value of oil and gas properties variously appraised in the vicinity of $779,000. The case had been very complex and required much court action and great skill. The fee was 36% of the property value, about $280,000.

Likewise in a long, complex will construction case, which involved an estate of $1½ million, the attorney's fee was set at $222,000. It may be noted that this was not for saving the estate, but for having the will construed. *Orme* v. *Northern Trust Co.*, 29 Ill. App. 2d 75, 172 N.E. 2d 413 (1961). This is an allowance of 14.8% of the amount involved.

In re Williams' Estate, 415 Pa. 273, 203 A. 2d 323 (1964) finds the appellate court reducing the attorney's fee from $82,150 to $70,000 where counsel's efforts benefited the estate by $325,000. It may be observed that the reduced fee amounts to 21.5% of the increment.

Where the defendant had to pay the fee in a treble damage suit for anti-trust violation, the fee was set at $50,000 for a triple recovery totaling $75,000. *Volasco Products Co.* v. *Lloyd A. Fry Roofing Co.,* 346 F. 2d 661 (6th Cir. 1965) *cert. denied,* 382 U.S. 904 (1965).

More liberal than some others was the allowance in *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.,* 245 F. Supp. 258, 303-304 (M.D. Pa. 1965) reversed in part on other grounds, 377 P. 2d 776 (3d Cir. 1967), rev'd in part on other grounds, 392 U.S. 481 (1968). The recovery was $4,239,609. The trial lasted 19 days, while the record consisted of 2,533 pages. The fee allowed the chief counsel was $600,000, while the associates were allotted $50,000 in addition. While the record of hours was great, it was said to be incomplete, however, the court arrived at the fee without reference to that basis and said such a record was not essential. It was noted that the chief counsel's fee amounted to 42% of the simple damages and less than 15% of the treble award (p. 303).[12] The same counsel had a private agreement with the client whereby he was to receive 20% of any recovery.

In a Chapter X bankruptcy re-organization, the trustee's counsel had been given a fee of $900,000, which was reduced by the Court of Appeals to $800,000, because it was not contingent nor of unusual character, but simply routine performance. *Surface Transit, Inc.* v. *Saxe, Bacon & O'Shea,* 266 F. 2d 862, 865 (1959).

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12 The District Court appended (p. 304) a reference footnote to nine other cases in which fees awarded had ranged from $25,000 to $500,000 and measured from 7.97% to 33.33% of the treble damages.

In *Webster Motor Car Co.* v. *Packard Motor Car Co.*, 166 F. Supp. 865 (D.C., D.C. 1955), a treble damage suit under the anti-trust laws, the court allowed attorneys for the successful plaintiff, fees of $45,000—23 or 24% of the single damages, said fees to be contributed by the defendants. However, the court specifically acknowledged the right of plaintiff's counsel to charge his client a fee "much larger than the amount I intend to award as the amount to be paid by the defendants." (p. 866)

The court carefully reviewed a number of similar cases in various federal courts with comparable percentages allowed to counsel. It stands as another guide to show that the fee before this Court was fairly and soundly fixed and is not excessive.

These examples are offered only to indicate that in the long run the value of legal services must be adjudged partly in the light of the benefit conferred upon the client. Lawyers who represent the impoverished cannot expect to be paid at all, yet the courts regularly designate counsel.[13]

B) When a Verdict Is Supported by Substantial Evidence, the Trial Court May Not Substitute Its Own Conclusion for That of the Jury.

In *Tennant* v. *Peoria & P.U. Ry. Co.*, 321 U.S. 29, 32-33, 35 (1944), the Court voiced again a long-standing rule:

> (p. 35) "Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

In accordance with familiar rules the Court said (p. 32):

> "The essential requirement is that mere speculation be not allowed to do duty for probative facts after

[13] In *Perry* v. *United States*, 118 App. D.C. 360, 336 F. 2d 748 (1964), this plaintiff-appellant Brown was assigned by the District Court to defend an indigent charged with narcotics violation. When a 3-day jury trial resulted in a conviction, this Court reversed and remanded on Brown's appeal.

making due allowance for *all reasonably* (33) *possible inferences favoring the party whose case is attacked* (citations omitted).

"If that requirement is met, as we believe it was in this case, the issues may properly be presented to the jury. *No court is then justified in substituting its conclusions for those of the 12 jurors.*" (italics supplied)

In that case the Court reversed an appellate court order for judgment n.o.v.

If the record contains "substantial evidence" to support the verdict, the mere fact that the judge might not have awarded so large an amount will not justify "a usurpation of judicial authority" by setting the verdict aside. *Werthan Bag Corp.* v. *Agnew,* 202 F. 2d 119, 122-123 (6th Cir. 1953).

On a parallel with our case, the Third Circuit reversed both a judgment n.o.v. and a conditional order for new trial in *Lind* v. *Schenley Industries, Inc.,* 278 F. 2d 79, 88-89 (3d Cir. 1960), saying: "* * * this verdict may be reversed *only if there is no substantial evidence* which could support the verdict." (italics added)

Here, too, the Court decries this "invasion of the jury's province" and recognizes (p. 89) that if "there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion, and it is immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable".

These rules are not obscure, but well-known in this Court where "substantial evidence" has been defined as the accepted standard for jury action. *Baltimore & Ohio R. Co.* v. *Postom,* 85 App.D.C. 207, 208, 177 P. 2d 53, 54 (1949); *Courier Post Pub. Co.* v. *Federal Communications Commission,* 70 App.D.C. 80, 84, 104 F. 2d 213 (1939). Accordingly, this Court applied the "substantial evidence"

rule to sanction "the maximum recovery that the evidence will support". *Boyle* v. *Bond,* 88 App.D.C. 178, 179, 187 F. 2d 362, 363 (1951). Any amount lacking such support would have to be curtailed, but the evidence must be construed in the light most favorable to the plaintiff. *Snodgrass* v. *Cohen,* 96 F.Supp. 292, 294 (D.C., D.C. 1951) and cases cited. *Graling* v. *Reilly,* 214 F.Supp. 234, 237 (D.C., D.C. 1963).

The mere fact that the verdict is high does not alone justify a new trial. *Graling* v. *Reilly,* 214 F.Supp. 234, 237 (D.C., D.C. 1963); *Fritz* v. *Pennsylvania RR. Co.,* 185 F. 2d 31, 37 (7th Cir. 1950).

In order to consider a verdict excessive there must be something more than a mere visceral aversion by the trial judge. No principle of constitutional law is more firmly established than the rule that the jurors are the exclusive judges of the facts, as well stated by Judge Keech of this City in *Hilleary* v. *Earle Restaurant,* 109 F.Supp. 829, 838 (D.C., D.C. 1952) where he said:

> (p. 838) "It is the peculiar function of the jury to determine the amount of recoverable damages by their verdict. '*In no case is it permissible for the Court to substitute itself for the jury,* and compel a compliance on the part of the latter with its own view of the facts in evidence, as *the standard and measure of that justice which the jury itself is the appointed constitutional tribunal to award,*' unless the verdict is so excessive or outrageous with reference to all the circumstances of the case as to demonstrate that the jury have acted against the rules of law, or have suffered their passions, their prejudices, or their perverse disregard of justice to mislead them. In view of the nature of the plaintiff's injury and in the light of all the testimony in this case, the court cannot say the verdict is so excessive as to be beyond reason and to shock the conscience." (italics supplied) [quoting and citing *Barry* v. *Edmunds,* 116 U.S. 550. See also *Snodgrass* v. *Cohen,* 96 F. Supp. 292, 294 (D.C., D.C. 1951), and cases there cited.]

This gives vitality and meaning to the Seventh Amendment of the United States Constitution which provides that jury verdicts shall not be re-examined except according to the rules of the common law. Thus, in *Byrd* v. *Blue Ridge Rural Elec. Co-op.*, 356 U.S. 525, 537 (1958), Justice Brennan said of the federal courts:

> (p. 537) "An essential characteristic of the system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury, and under the influence—if not the command—of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury." (italics added)

While this is fully recognized as not barring a grant of new trial in a proper case, it is thoroughly settled as a protection against judicial encroachment upon the jury function when the verdict has the support of "substantial evidence."

Speculation as to the jury's state of mind is clearly outside the scope of the trial court's function. Ingenious arguments might be invented to assail the findings, but the Seventh Amendment prohibits this encroachment. In the *Tennant Case, supra,* the Supreme Court said:

> (321 U.S. at 34). "These and other possibilities suggested (35) by diligent counsel for respondent all suffer from the same lack of direct proof as characterizes the one adopted by the jury.
>
> * * *
>
> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences."

Under the *Tennant Case,* and all the authorities, it is the jury which must resolve the conflicts, evaluate the evidence, draw any necessary inferences, judge the credibility of the witnesses, and decide the issues. "The focal point

of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury." *Tennant* v. *Peoria & P.U. Ry. Co., supra,* at p. 35.

It is fundamental that judicial discretion ends when the record discloses evidence from which the jury may have reasonably drawn the conclusion represented by the verdict. This is a necessary consequence of the rule that credibility of witnesses and the weight to be given their testimony are questions exclusively for the jury, who may believe or not, accept or discard. *Gunning* v. *Cooley,* 281 U.S. 90, 94 (1930) *affirming* 58 App. D.C. 304, 30 F. 2d 467 (1929); *Lavender* v. *Kurn,* 327 U.S. 645, 653 (1946); *Sartor* v. *Arkansas Natural Gas Corp.,* 321 U.S. 620, 628 (1944). In the case last cited, it was said,

> (p. 628) "The jury were the judges of the credibility of the witnesses * * * and in weighing their testimony had the right to determine how much dependence was to be placed upon it * * * That part of every case, such as the one at bar, belongs to the jury, * * * and so long as we have jury trials, they should not be disturbed in their possession of it, except in a case of manifest and extreme abuse of their function."

It was never intended that jury verdicts be merely advisory opinions subject to the trial judge's veto power. So long as the verdict is based upon substantial evidence it is binding upon the courts. *Atlantic and Gulf Stevedores, Inc.* v. *Ellerman Lines, Ltd.,* 369 U.S. 355, 358 (1962).

CONCLUSION

It seems that gratitude is not to be found in a client's lexicon when dealing with his lawyer, but we have Mr. Lamb's own fine words before the F.C.C. when he said, "I believe that in this matter I have retained the services of the most competent legal talent in the United States . . . Mr. McGrath, Mr. Brown, and their associates." (Tr. 210, 211, Pl. Exh. 14, F.C.C. record, pp. 6956-6957). While

he was yet on the witness stand at the F.C.C. he paid "a special tribute to Mr. Brown." (Tr. 212, Exh. 15, F.C.C. record p. 6403). But such feelings are short-lived as human memory, and lawyers must sometimes, as Canon 14 of the Professional Ethics recognized 60 years ago, sue for fees "to prevent injustice, imposition, or fraud." (Appendix A, p. a3, infra).

It is submitted the order for judgment n.o.v. is erroneous as a matter of law and should be reversed. The conditional order for new trial is an unwarranted invasion of the jury's province. It is prayed that this Court reverse and remand the cause with directions to enter judgment on the verdict. 28 U.S. Code § 2106 (App. A, p. 3, infra); *Lind* v. *Schenley Industries, Inc.*, 278 F. 2d 79, 91 (3d Cir. 1960).

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May 13, 1968

APPENDICES

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APPENDIX A

Constitutional Provision, Statutes, and Rules Involved

7th Amendment, U.S. Constitution:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

District of Columbia Code, Sec. 12-301 (1967):

> Except as otherwise specifically provided by law, actions for the following purposes may not be brought after the expiration of the period specified below from the time the right to maintain the action accrues;
>
> * * *
>
> (7) on a simple contract, express or implied,—3 years;
>
> * * *

District of Columbia Code, Sec. 28-3504 (1967):

> In an action upon a simple contract, an acknowledgment or promise by words only is not sufficient evidence of a new or continuing contract whereby to take the case out of the operation of the statute of limitations or to deprive a party of the benefit thereof unless the acknowledgment or promise is in writing, signed by the party chargeable thereby. * * *

Title 18, U.S. Code, § 1001
(False Statements to Federal Agencies):

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and wilfully falsifies, conceals or covers up by any trick, scheme or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 749.

American Bar Association. Professional Ethics

Canon 12

Fixing the Amount of the Fee

• • •

In determining the amount of the fee, it is proper to consider:

(1) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite properly to conduct the cause;

(2) whether the acceptance of employment in the particular case will preclude the lawyer's appearance for others in cases likely to arise out of the transactions, and in which there is a reasonable expectation that otherwise he would be employed, or will involve the loss of other employment while employed in the particular case or antagonisms with other clients;

(3) the customary charges of the Bar for similar services;

(4) the amount involved in the controversy and the benefits to the client from the services;

(5) the contingency or the certainty of the compensation; and

(6) the character of the employment, whether casual or for an established and constant client.

No one of these considerations in itself is controlling. They are mere guides in ascertaining the real value of the service.

• • •

(As adopted August 27, 1908, 33 ABA Reports 61)

Canon 14

Suing a Client for a Fee

Controversies with clients concerning compensation are to be avoided by the lawyer so far as shall be compatible with his self-respect and with his right to receive reasonable recompense for his services; and lawsuits with clients should be resorted to only to prevent injustice, imposition or fraud.

(As adopted August 27, 1908, 33 ABA Reports 85)

28 U.S.C. § 2106, 62 Stat. 963
(Appellate Court Procedure):

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree or order, or require such further proceedings to be had as may be just under the circumstances."

APPENDIX B

(112 O. App. 116, 171 N.E. 2d 191)

RUSSELL M. BROWN, *Appellant,*

v.

EDWARD OLIVER LAMB, and DISPATCH, INC., *Appellees.**

Court of Appeals of Ohio,
Lucas County.

Jan. 25, 1960.

Action against corporation and its president for services rendered by attorney in the matter of the renewal of a TV station license. The Court of Common Pleas, Lucas County, granted motions to strike the complaint from the files because complaint was frivolous, vexatious, and scurrilous and because complaint was not in ordinary and concise language, and to quash service of summons on corporation, and plaintiff appealed on questions of law. The Court of Appeals, Fess, P. J., held that where petition alleged that cause of action accrued within jurisdiction and motion to quash alleged that it did not, a question of fact had been presented for determination and court could not conclude, as a matter of law upon the state of the pleadings, that it did not have jurisdiction over the corporation, and that, although petition contained possibly evidentiary allegations, petition was nevertheless not frivolous, vexatious or scurrilous, and stated a cause of action good as against a demurrer.

Reversed and remanded.

• • •

* Motion to certify overruled by Supreme Court, Oct. 13, 1960.

Dan H. McCullough and Richard T. Secor, Toledo, for appellant.

Farber, Cochrane, Green & Schrader, Toledo, for appellees.

Fess, Presiding Judge.

Appeal on questions of law taken from two judgments of the court of common pleas entered August 27th, 1959, as follows:

> "This day this cause came on to be heard upon the motion of the defendant, Edward Oliver Lamb, to strike plaintiff's petition from the files on the grounds that the said petition violates Section 2309.04 of the Revised Code of Ohio in that it is not in ordinary and concise language and is frivolous, vexatious and scurrilous. The court being fully advised in the premises, finds that said motion is well taken and should be and is hereby granted. It is, therefore, ordered, adjudged and decreed that the petition of the plaintiff be stricken from the files because it is not in ordinary and concise language and is frivolous, vexatious and scurrilous. Exceptions are granted to the plaintiff. The plaintiff not wishing to file an amended petition, the petition herein is dismissed at plaintiff's costs. Exceptions."

> "This cause came on to be heard on Motion of Dispatch, Inc. to quash service of summons upon it for the reason that it is now and always has been a corporation organized and existing only in the Commonwealth of Pennsylvania, is not qualified or admitted in Ohio as a foreign corporation and has never been and is not new engaged in the transaction of business within the State of Ohio and has not either appointed an agent or anyone else upon whom service of process against it can be made in Ohio nor has it otherwise consented to service of summons upon it in actions brought in this state, nor did the alleged cause of action of the plaintiff arise within the State of Ohio. The court, being fully advised in the premises, finds that said motion is well taken and should be and it is hereby granted and the service of summons upon said defendant, Dispatch, Inc. is hereby quashed. It is, therefore, ordered, ad-

judged and decreed that the service of summons upon defendant, Dispatch, Inc. is hereby quashed. Exceptions to plaintiff."

I. Order Sustaining Motion to Quash.

The transcript of the docket and journal entries discloses return of summons on May 5, 1959, made upon the corporate defendant by delivering to its president, Edward Oliver Lamb, personally, a certified copy of the writ with endorsements thereon together with a copy of the petition, and also copies of petition and summons served upon the defendant Lamb and copy of service of summons served upon the corporate defendant by registered mail. On May 29, 1959, leave was granted defendant (without designating which one) to move on or before June 1, 1959, or to plead on or before July 1, 1959. On June 1, 1959, defendant Dispatch, Inc. filed its motion to quash service of summons. On June 2, 1959, the aforesaid entry of May 29, 1959, was vacated and held for naught and leave was granted to defendant Lamb to move on or before June 15, 1959, or to plead on or before July 1, 1959.

In his petition, plaintiff alleged that the defendant Lamb individually and as president of Dispatch, Inc., employed the plaintiff as attorney in the matter of the renewal of a TV station license, and that said cause of action or some part thereof arose in Lucas County, Ohio.

The motion to quash recites:

"Dispatch, Inc. moves the court to quash the service of summons upon it for the reason that it is now and always has been a corporation organized and existing only in the Commonwealth of Pennsylvania, is not qualified or admitted in Ohio as a foreign corporation and has never been and is not now engaged in the transaction of business within the state of Ohio and has not either appointed an agent or any one else upon whom service of process against it can be made in Ohio nor has it otherwise consented to service of summons upon it in actions brought in this state, nor did the alleged cause of action of the plaintiff arise within the State of Ohio."

Neither the petition nor the motion to quash is positively verified.

It is to be noted that no reservation of special appearance was made in the motion to quash and also that the journal entry sustaining such motion merely recites the allegations of the motion to quash and that the court "being fully advised in the premises, finds" the motion well taken, and thereby fails to recite that evidence was received at the hearing on the motion. The statement in plaintiff-appellant's brief that no hearing on the motion was had is not denied by appellee.

[1] The corporate defendant moves to dismiss the appeal as to it on the ground that the appeal is not taken from a final order by reason of the fact that the petition was not dismissed, citing in support thereof Puthoff v. Owens-Illinois Glass Co., Ohio App., 31 N.E. 2d 684 and 2 Ohio Juris. Sec. 43, p. 610. However, the effect of the order in the instant case, sustaining the motion to quash has the consequence of terminating the action as against the corporate defendant and the plaintiff's right to prosecute the same, in holding that the defendant is not amenable at all to the jurisdiction of the court and its process. We therefore conclude, as did the Court of Appeals in Franklin County in Rucker v. Personal Finance Co., 86 Ohio App. 110, 90 N.E. 2d 428, that the order quashing the service of summons on a foreign corporate defendant, without dismissing the petition, effectually determined the jurisdictional question as well as the action, and that the order is final within the meaning of R.C. § 2505.02. The motion to dismiss the appeal is therefore overruled.

[2] Although the above entry of May 29, 1959, does not indicate which of the two defendants sought leave to move or plead, the subsequent motion of the corporate defendant to quash service, filed June 1, 1959, and the entries of June 2, 1959, vacating the entry of May 29, 1959, and granting leave to the individual defendant to

move or plead, may indicate an effort on the part of the corporate defendant to avoid the consequences of entry of appearance made on May 29, 1959. It is also to be observed that the motion to quash was not made under a special appearance. As a general rule, a motion to quash service, without special appearance for the sole purpose of attacking the jurisdiction of the court over the person of the moving defendant, does not constitute in itself an entry of appearance. On the other hand, a motion attacking the jurisdiction over the person, which also involves the merits of the case made in the petition, constitutes an appearance. Handy v. Insurance Co., 37 Ohio St. 366; Maholm v. Marshall, 29 Ohio St. 611; Elliott v. Lawhead, 43 Ohio St. 171, 1 N.E. 577; Wharton v. Pollock, 49 Ohio App. 443, 197 N.E. 379; Jones v. Andrews, 14 Ohio Law Abst. 160; Elbert v. Schwab, 14 Ohio Law Abst. 702; Noaker v. U. S. Fidelity & Guaranty Co., 16 Ohio Law Abst. 133; Cf. Bennett v. Radlick, 104 Ohio App. 265, 145 N.E. 2d 334.

[3] In as much as the petition alleged that the cause of action or some part thereof accrued in Lucas County and the motion to quash alleged that it did not, a question of fact was presented for determination by the court in passing upon the motion to quash, and the court therefore could not conclude as a matter of law upon the state of the pleadings that it did not have jurisdiction over the person of the defendant.

The judgment must therefore be reversed and the cause remanded for redetermination of the motion to quash, as well as whether the defendant had previously entered its appearance on May 29, 1959, by reason of the filing of the motion to quash without special appearance.

II. Order Striking Petition From Files.

[4, 5] The petition, comprising fourteen pages, does not comply with the mandate of R.C. § 2309.04 by stating facts constituting a cause of action in ordinary and concise language. It is verbose, redundant and pleads irrelevant

and evidentiary facts. The usual and ordinary remedy accorded a party prejudiced by failure of the plaintiff to comply with the statute is by motion to strike. R.C. § 2309.33 specifically provides that if redundant, irrelevant or scurrilous matter be inserted in a pleading, it may be stricken *out* on motion of the party prejudiced thereby. R.C. § 2309.70 provides that motions to strike pleadings and papers from the files may be made with or without notice as the court directs. But this remedy is ordinarily employed to strike pleadings for failure to comply with previous orders of the court, Harrison v. Knight, 19 Ohio Cir. Ct. R., N.S., 457, 32 Ohio Cir. Dec. 522; Robinson v. Fitch, 26 Ohio St. 659; State ex rel. Continental Casualty Co. of Chicago v. Birrell, 164 Ohio St. 390, 131 N.E. 2d 388. The office of a motion to strike a pleading from the files is to test the regularity connected with the filing, as when filed after time, or its form with respect to certification, or for failure to comply with previous orders of the court. Its office is not to inquire into the merits of the case. Finch v. Finch, 10 Ohio St. 501, 505; Black v. Goodman, 12 Ohio Cir. Ct. R., N.S., 287, 22 Ohio Cir. Dec. 369; Blaney v. Baltimore etc. R. Co., 7 Ohio App. 322, 323; Rogers v. Metropolitan etc. Co., 15 Ohio App. 333. The motion may also be employed to strike sham or frivolous pleadings. White v. Calhoun, 83 Ohio St. 401, 94 N.E. 743. And the exercise of the power to strike a sham pleading necessarily imports the taking of evidence at the hearing thereon. Cf. White v. Calhoun, supra; Rogers v. Metropolitan Life Ins. Co., 15 Ohio App. 333; Schottenfels v. Massman, 16 Ohio App. 78; Metzenbaum v. Lyman, Ohio Com. Pl., 108 N.E. 2d 869; Brown v. Bahrick, Ohio Com. Pl., 131 N.E. 2d 691; Carter v. City of Wooster, Ohio Com. Pl., 155 N.E. 2d 533. Contra: Golay v. Zollinger, 16 Ohio Law Abst. 387, wherein the answer failed to state a valid defense. And where there arises a conflict of evidence upon a material point, or a rational doubt as to the proper order to be made, the motion should be overruled. White v. Calhoun, supra. The Supreme Court has said that it does not approve the

practice of using a motion to strike from the files in place of a demurrer. Robinson v. Fitch, supra.

In Stoutenburg v. Lybrand et al., 13 Ohio St. 228, the court states:

> "Under the code, demurrers go to the substance and not to the form of pleadings. If a pleading liberally construed, sets out a sufficient cause of action or defense, though it may be defectively stated, a demurrer to it will not lie. Objections to defects *extending only to the mode of statement must be taken by motion.* The code requires the allegations of a pleading to be expressed in ordinary language." (Italics supplied.)

[6] And the alleged insufficiency of a pleading in substance, ought to be taken by demurrer, and not by motion to strike from the files. Buckeye Garage etc. Co. v. Caldwell, 18 Ohio Cir. Ct. R., N.S., 429, 33 Ohio Cir. Dec. 136; Bertram v. Theobald Mumford Co., 25 Ohio Cir. Ct. R., N.S., 111, 26 Ohio Cir. Dec. 349; Ohio, Indiana & Kentucky Heater Co. v. Schafer, 19 Ohio App. 399. Likewise, material averments and entire causes of action may not be stricken out on motion, but must be met by demurrer or answer. Long v. Newhouse, 57 Ohio St. 348, 49 N.E. 79; Shaw v. Midland Bank, Ohio App., 33 N.E. 2d 422. Cf. 31 O.Jur. 887, 888.

[7] It will thus be observed that as in the case of passing on a demurrer, so also in the case of a motion to dismiss a pleading on the ground that it is not in ordinary or concise language, the demurrer must be overruled and a motion to dismiss on such ground must likewise be overruled. As above stated, the remedy is by way of motion to strike from the pleading. Defendants' counsel contends that the petition is so replete with evidentiary, redundant and other improper allegations that a motion to strike would be as lengthy as the petition itself and, if granted, would so emasculate the petition as to leave nothing of substance remaining, and would impose undue hardship upon the court

and counsel. Notwithstanding this contention, we are of the opinion that the appropriate remedy is by way of motion to strike or possibly by motion to make definite and certain.

As above stated, the petition was stricken from the files on the ground that it is not couched in ordinary and concise language, and upon the further ground that it is frivolous, vexatious and scurrilous.

[8, 9] Although no statutory power is conferred upon the court of common pleas to strike a petition on the ground that it is frivolous, it is said that the court has inherent power to do so. A pleading is called "frivolous" when it is clearly insufficient on its face and does not controvert the material points of the opposite pleading and is presumably interposed for mere purposes of delay or to embarrass the opponent. White v. Calhoun, supra; Christie v. Drennon, 1 Ohio Dec. 374; Erwin v. Lowery, 64 N.C. 321; Strong v. Sproul, 53 N.Y. 497, 499; Grey v. Gidiere, 4 Strob., S.C., 438, 442; In re Beam, 93 N.J.Eq. 593, 117 A. 613, 614; Milberg v. Keuthe, 98 N.J.L. 779, 121 A. 713, 714. In Ohio, the motion has been employed to strike from the files a frivolous answer or cross-petition filed for the mere purpose of delay. White v. Calhoun, supra; Christie v. Drennon, supra.

[10] The term "vexatious" as applied to a pleading imports that it is instituted maliciously and without probable cause for the purpose of annoying and embarrassing one's opponent or when it is not calculated to lead to any practical result. Black's Law Dictionary, 4th Ed.

[11] "Scurrilous" imports indecency or abuse and is synonymous with vile, vulgar, foul or foul-mouthed. United States v. Strong, D.C., 263 F. 789, 796; United States v. Ault, D.C., 263 F. 800, 810.

[12] We have examined the petition with some care and are of the opinion that it is not frivolous, vexatious or

scurrilous, and, under the rule of liberal construction, states a cause of action good as against a demurrer.

The petition does contain allegations possibly evidentiary in character of charges of Communistic affiliation by the individual defendant made before the Federal Communications Commission by way of supporting the claim of the plaintiff with respect to the value of the services plaintiff rendered the defendants, which might seem vexatious to the defendant but, absent a finding upon evidence that no such charges were made, it can not be held that such allegations are either scurrilous or necessarily vexatious.

[13] It is further contended by appellee that, in the absence of a bill of exceptions, the presumption of regularity of the proceedings incident to the granting of the motion requires affirmance. Cf. Barrett v. W. S. Goff Co., 11 Ohio Law Abst. 323. As above indicated, however, it is not to be presumed from the language employed in the journal entry that the motion was divided upon evidence. Therefore, the situation arising on this appeal is analogous to that presented on an appeal from the dismissal of a petition after the sustaining of a demurrer. The presumption of regularity, therefore, does not arise. On the contrary, it appears that the motion to dismiss was decided as a matter of law, solely upon the allegations of the petition.

III. Conclusion.

In the light of the foregoing considerations, the judgments of the common pleas court sustaining the motion to quash service of summons and dismissing the petition on the ground that it is not in clear and concise language and is frivolous, vexatious and scurrilous, must be reversed and the cause remanded to the court of common pleas for further proceedings according to law.

SMITH and DEEDS, JJ., concur.

APPENDIX C

1 UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1292-63

RUSSELL MORTON BROWN, *Plaintiff*

v.

EDWARD OLIVER LAMB and DISPATCH, INC., *Defendants*

Washington, D. C.
Thursday, June 1, 1967

Before the Honorable WILLIAM B. JONES, United States District Judge, at 10:10 a.m. today.

Appearances:

In behalf of the Plaintiffs:
Mr. MILTON M. BURKE

In behalf of the Defendants:
Mr. N. MEYER BAKER

5 EXCERPTS FROM PROCEEDINGS

The Court. I am going to get to that in a minute, Mr. Burke.

Mr. Burke. If Your Honor please, would Your Honor indulge me a moment? Mr. Russell Morton Brown, the plaintiff, and who is a member of the Bar of this Court, would like to address Your Honor.

The Court. Surely.

Mr. Brown. Thank you very much, Your Honor.

If Your Honor please, at the conclusion of these services, the principal defendant, Mr. Edward Lamb, who is a resident of Toledo, Ohio, left the city; and, so far as I was aware, he never came back. Certainly he never announced it to me, and I didn't see him and wasn't in touch with him, except for discussions once in a while. But the indications were we were going to adjust our differences.

Subsequently I called upon him in his office in Ohio and discussed the matter with him, and we had some pertinent references to the matter. And even though all the records of the proceeding were here before the Federal Communications Commission—and you can imagine the bulk of the record and the number of witnesses and all the officials who were engaged who would possibly have to testify—I felt obliged to initiate proceedings in Ohio.

The corporate plaintiff or the corporate party
6 whom I represented was a Pennsylvania corporation,
of Erie, Pennsylvania, before the Federal Communications Commission. However, because Mr. Lamb was president, we felt that we had satisfactory jurisdiction. Of course he objected to that.

Subsequently in Ohio the Court of Common Pleas dismissed our complaint, on his motion, and we had to go to the Court of Appeals—the intermediate appellate court, not the highest court of Ohio, but the first appellate court—and it was reinstated.

Thereafter no action was taken by Mr. Lamb to move the case for trial. We came to the conclusion that no adjustments would be made, although we were promised and we kept waiting for some discussions to be initiated. But nothing happened. And finally I learned that Mr. Lamb was going to be in the City of Washington at a particular time, and we prepared the complaint which was filed in this cause.

We have done everything possible to move this cause to trial, and leave the one in Ohio in effect. But we are met immediately with a plea of the statute of limitations in the District of Columbia. Now if there were no question of that sort, Your Honor, I would unhesitatingly dismiss in Ohio, I say frankly. And I would make that offer right now, that if Mr. Lamb would remove the question of limi-
tations from the case here, I would be glad to dismiss
7 in Ohio, without a moment's hesitation. And I make
that offer and that tender here for the record, be-

cause the case can only effectively be tried here, because of the records and the officials and—

The Court: I think also, Mr. Brown, that tactically the better place to bring it is here.

Mr. Brown: Well this is where the services were performed, Your Honor.

The Court. And also I think the nature of the services is better understood here,—

Mr. Brown. Very much so, Your Honor.

The Court. —than in Toledo, Ohio.

I understand your problem. The thing that bothers me is this. Your have had a case running in Ohio since 1959,—

Mr. Brown. Yes, sir.

The Court. —and one here since 1963. Both go against the same parties for the same amount, attorney's fees.

Mr. Brown. Yes, sir.

If Your Honor will indulge me, I think that is a perfectly sound and sensible observation. And if there were to be a choice, if you were to say, "Take your pick. You can't proceed against them in both places," we would say, "Fine; we'll agree to stay the one in Ohio." The only reason we don't want to dismiss is he is still pleading limitations here. And it could conceivably happen that we would prevail here, we would get a judgment for services, and on appeal the Court of Appeals could decide that the statute of limitations is a bar to the action here. Then we are in the position, Your Honor, of being faced with a dismissal of our action, forced upon us by your order here, of the Ohio case—which is unquestionably timely.

The Court. Are you ready to go to trial in this case?

Mr. Brown. Yes, Your Honor, we certainly are.

The Court. Mr. Baker, are you ready to go to trial in this case?

Mr. Baker. I can't say, Your Honor.

The Court. Well, you're going to trial.

Mr. Brown. Good. Thank you, Your Honor.

The Court. I will deny your motion to stay. This case will be tried and disposed of.

Mr. Brown. Thank you very much, Your Honor.

The Court. And I will set it specifically for—

Be seated, gentlemen. I am going to give you a trial date here in a few minutes.

Mr. Baker. If Your Honor please, I have a number of trial commitments.

The Court. You're going to have one right here. You're going to have one right here. This thing of moving to dismiss in the Ohio case and moving to stay in this one, we don't play that way here.

(Following a brief interval:)

The Court. Counsel, go to Mr. Collins. We will give you a date. If you have any trouble, come back to me.

(Accordingly at 10:25 a.m. the hearing in the instant matter was concluded.)

APPENDIX D

IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

No. 186753

RUSSELL M. BROWN, *Plaintiff*,

v.

EDWARD OLIVER LAMB, ET AL., *Defendants*.

Motion to Dismiss

Now come the defendants, by their attorney duly authorized, and move the Court for an Order dismissing the above entitled cause on the ground that on May 21, 1963, this plaintiff filed a case agaist these defendants in the United States District Court, in the District of Columbia, Washington, D. C., which was and is an exactly identical case to this case.

Defendants further represent to this Honorable Court that on Thursday, June 1, 1967, the Honorable William B. Jones, Judge of the United States District Court for the District of Columbia, ruled on a Motion filed in that Court by these defendants asking for a stay of proceedings on the ground that Cause No. 186753 was pending in the Court of Common Pleas of Lucas County, Ohio, and that a trial on the merits of the Federal District Court case, known as Civil Action No. 1292-63 should be stayed until such time as the case in Lucas County, Ohio, Common Pleas Court was fully adjudicated one way or the other.

Defendants further represent to this Court that Honorable William B. Jones, United States District Judge, did overrule the Motion of the defendants, and he did then and there assign Civil Action No. 1292-63 for trial at 10:00 A.M., June 19, 1967. This was to be a jury trial on the merits. However, on Thursday morning, June 15, 1967,

the Assignment Clerk in charge of assigning jury trials to be presided over by the Honorable William B. Jones, United States District Judge, did telephone defendants counsel and did then advise that due to certain unforeseen circumstances that the Civil Action No. 1292-63 could not commence as scheduled, and that therefore it was reset for trial in early October, 1967, which is the beginning of the Fall Term of the United States District Court for the District of Columbia.

WHEREFORE, the defendants pray the court for an order dismissing without prejudice Cause No. 186753 on the single ground that there is another action pending between the same parties for the same identical cause of action, in the United States District Court in the District of Columbia, the same being Civil Action No. 1292-63.

Respectfully submitted,

JOHN W. RITTER
John W. Ritter
Counsel for Defendants.

Aug. 11, 1967

Brief in Support of Motion

* * * * * * * * * *

The case of Brown v. Lamb, Civil Action No. 1292-63 has been set for trial to commence during the week of October 1967. The Federal District Court for the District of Columbia, on or about May 29, 1967, entered upon its Journal an Order which, in essence, held that service by that court made on the two defendants, namely, Edward Oliver Lamb and Dispatch, Inc., the same identical defendants as are in the herein cause, was valid and *that the statute of limitations relative to plaintiff's cause of action had not run,* and further, that the said District Court of the District of Columbia had full jurisdiction and authority to try plaintiff's law suit on its merits. (Italics supplied)

It is submitted that under all the facts and evidence that we now have in our possession, presented to this Honorable Court herein, and under the applicable law of Ohio as set forth herein, this court should definitely enter its order dismissing plaintiff's petition in case No. 186753.

Respectfully submitted,

JOHN W. RITTER
John W. Ritter, Attorney for
Edward Oliver Lamb and Dispatch, Inc., a Pennsylvania
corporation.

Aug. 11, 1967

APPENDIX E

COURT OF COMMON PLEAS
LUCAS COUNTY, OHIO

Toledo, Ohio
January 29, 1968

James Farber
Attorney at Law
840 Spitzer Building
Toledo, Ohio

In re: Brown v. Lamb Case No. 186723

Dear Mr. Farber:

After going over the opinion of the Federal Judge, for the District of Columbia, the letters in the file concerning the trial of the case in Washington and the issues involved, and the arguments of local counsel, I have decided to keep the above mentioned case on the inactive list pending the outcome of the appeal of the Federal Court case.

I am doing this because the Statute of Limitations definitely was a factor in the trial in the Federal Court and was in the actions later taken by the Federal Judge. Since the Statute of Limitations is not a factor in the case in our Court of Common Pleas, I have determined that this case should not be dismissed at this time for want of prosecution.

I am therefore replacing the case on the inactive list.

Sincerely yours,

GEORGE N. KIROFF
Judge

GNK:lbh
cc: Merritt W. Green

BRIEF FOR APPELLEES

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,686

RUSSELL MORTON BROWN, *Appellant*

v.

EDWARD OLIVER LAMB and DISPATCH, INC.,
a Pennsylvania Corporation, *Appellees*

On Appeal From the United States District Court for the District of Columbia

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Washington, D. C. 20005
Attorney for Appellees

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INDEX

STATUTES AND RULES INVOLVED

Page

TABLE OF CASES CITED

* Cases marked with asterisks are chiefly relied upon.

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IN THE

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FOR THE DISTRICT OF COLUMBIA CIRCUIT

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RUSSELL MORTON BROWN, *Appellant*

v.

EDWARD OLIVER LAMB and DISPATCH, INC.,
a Pennsylvania Corporation, *Appellees*

BRIEF FOR APPELLEES

On Appeal From the United States District Court for the District of Columbia

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QUESTIONS PRESENTED

In the opinion of Appellees, the questions presented in this appeal are:

1. Did the Appellant present any evidence in writing or by way of estoppel to take his claim out of the Statute of Limitations when his claim had accrued nearly six (6) years prior to the time that he filed suit thereon? (Claim accrued June 18, 1957—Suit filed on May 21, 1963)

2. Was not the action of the Trial Court correct in granting Appellees' motion for judgment N.O.V. after first permitting the jury to pass upon the factual issues and then setting aside the jury's verdict because such verdict was not based upon the evidence and the law as given to the jury by the Court?

STATEMENT OF POINTS

1. It is the obligation of a Trial Court to set aside a verdict and grant judgment N.O.V. when the verdict is not supported by the law and the evidence.

SUMMARY OF ARGUMENT

1. The Statute (D. C. Code 28-3504) required a paper writing to take a claim out of the statute and in the absence of such a writing, a claim is barred.

2. The Trial Court followed the procedure approved by this Court in setting aside a jury verdict when such verdict could not be supported by the evidence and the law as given to the jury by the Court.

3. Appellant was experienced trial counsel, who by his tactics prejudiced the jury against the Appellees by the manner in which he tried this case.

4. Appellant's own delay created the bar to his claim in the Trial Court.

5. The verdict of the jury was not based upon the evidence but resulted from bias and prejudice.

ARGUMENT

1. The Statute (1967 D. C. Code 28-3504) requires a paper writing to take a claim out of the statute and in the absence of such a writing, a claim is barred.

> In an action upon a simple contract, an acknowledgement or promise by words only is not sufficient evidence of a new or continuing contract whereby to take the case out of the operation of the Statute of Limitations or to deprive a party of the benefit thereof *unless the acknowledgment or promise is in writing, signed by the party chargeable thereby.* * * * *(1967 D. C. Code Sec. 28-3504)*. Emphasis supplied.

The above quoted portion of the District of Columbia Statute required Appellant to have had some paper writing signed by or on behalf of the Appellees, either or both of them to remove his claim from the operation of this Statute.

Appellant has never claimed there was any such writing which would take his claim out of the Statute—and in fact there is none—but instead relies upon what he claims is estoppel against the Appellees. To do this, he was required to establish from the evidence that there is something that the Appellees did upon which he relied to his detriment. In lieu of a paper writing as required by the Statute, he seeks to set aside the judgment of the Court below on what he claims is too narrow a ruling of the Court's in following the plain clear definite direction of the Statute.

Appellees agree with the Appellant that the decisions in *Hornblower* v. *George Washington University,* 31 App D.C. 64, 75, (1908) and *Howard Univ.* v. *Cassell,* 75 App D.C. 75, 81, 126 Fed(2d) 6 (1941) Cert. denied, 316 U.S. 675, (1941) are the leading decisions in this District and are controlling in this case on appeal. In fact, Appellees state that these decisions are "on all fours" with the facts in this case and are determinative of this case on appeal.

In the Hornblower case, architects sued for a balance due them for services rendered. After they had rendered their bill, they agreed with the defendant University to submit their dispute to arbitration, which never took place. Appellants sought to rely upon a letter from the University stating that the architect's claim was being referred to the Executive Committee of the University for adjustment as tolling the Statute. The Appellate Court held:

> * * * "There must be some statement that is an equivalent to an acknowledgment of indebtedness. In fact, the rule announced in this country seems to go farther and require that there shall not only be an acknowledgment of indebtedness but a promise to pay." * * * 74.

And farther on in this same decision in passing upon the question of estoppel, the Court said:

> "We think it a well settled principle that a defendant cannot avail himself of the bar of the Statute of Limitations, if it appears that he has done anything that

would tend to lull the plaintiff into inaction, and thereby permit the Statute to run against him. If, by this agreement to arbitrate it appears from the record that plaintiffs, by the action of the defendant were induced not to bring this suit, then we think defendant would be estopped from pleading the bar of the Statute of Limitations. If, however, after the agreement was made to submit to arbitration, plaintiff took no steps toward having the matter submitted, and did not insist upon the defendant's submission of the matter, such an agreement we think, cannot be held to stop the running of the Statute. It not only appears from the statement in this case that the plaintiffs took no steps toward having a hearing before an arbitrator, but there is no affirmative showing that the defendant did anything to prevent the arbitration. It is not sufficient, if it should appear, that the defendant failed, or even refused, to appear before the arbitrator and submit its case. *Defendant must have done something that amounted to an affirmative inducement to plaintiffs to delay bringing action. The statement does not indicate that plaintiffs were deterred or delayed in bringing their suit because of the failure of the parties to appear and submit the matter to the arbitrator.*" * * * Page 75. Italics supplied.

In Howard University v. Cassell, supra, another architect sued for payment of architect's fees after conferences and discussions with the University representatives that extended for nearly two years before suit was filed. This Court in its opinion on Page 81 stated:

"A careful reading of all of the testimony, which we have summarized, shows very clearly that the University never acknowledged the correctness of the claim or that it owed anything or that it would pay anything. The most that can be said from it all is that there were negotiations looking toward an amicable settlement. Obviously, there was strong opposition in the Board of Trustees to the payment of the claim, and the only assurances if any there were, were to the effect that Cassell would be fairly dealt with. This is not enough to bring into operation the doctine of equitable estoppel. * * *", citing Hornblower v. George Washington University, supra, with reference to arbitration.

And farther on in the opinion:

> "As we have already said, this record does not show that the University actually induced Cassell not to bring his suit. On the contrary, practically from the time of submission of the claim to the time when he brought suit, the attitude of the Board was one of question, if not indeed of active opposition to pay. And after it became evident that the claim would not be recognized, Cassell had ample opportunity to bring his suit before the bar of the Statute fell. Instead, he even delayed in presenting his claim to the University authorities, resulting in acrimonious correspondence between the University and himself. It is, therefore, quite out of the question to say that anything the University did lulled Cassell into inaction until after the limitation period." Glennan v. Lincoln Investment Corporation, 71 App D.C. 366, 110 Fed(2d) 131 (1940).

Compare the facts in the instant case with the facts and law as set forth in the Hornblower case and Cassell case, supra. Appellant's claim accrued on June 18, 1957, when he billed Appellees. There followed a series of letters (JA 88-101) from Appellant to Appellee Lamb seeking to obtain payment, a confrontation with Appellee Lamb in New York City on January 19, 1959, a suit filed in the Lucas County Court of Common Pleas of Ohio, on April 28, 1959 (JA 76-88), an exchange of letters between Appellant and Appellee Lamb referring to possible settlement discussions and the suit in the Court below filed on May 21, 1963.

That Appellant was aware of the possible bar of the Statute of Limitations defense is clear from his evidence insisting upon a disposition of his claim in early 1959 following his confrontation with the Appellee Lamb in New York on January 19, 1959 (JA 52-53). Thereafter, on April 28, 1959, he filed suit in Ohio against both Appellees because he was certain that he would be able to obtain service of process upon them there, even though the Ohio statute provided for a six (6) year period of limitation

(Ohio Statute 2305-07). This Ohio suit was identical in claims, amounts and parties as the suit filed in the Trial Court below four years later. Appellant, better than anyone else, was aware of the nature of his claims and that it required litigation to dispose of it, as evidenced by his testimony (JA 49) and by his filing of his Ohio suit. In a hearing before the District Court on the Appellees' Motion to Stay the District of Columbia action while the Ohio action was pending, the Appellant participating personally in the instant suit in the Trial Court, called the Trial Court's attention to the fact that there was a serious question of the Statute of Limitations in his District of Columbia suit. In fact, he offered to dismiss the Ohio suit if Appellees would withdraw the defense of the Statute of Limitations in this case now on appeal. (See Appellant's Appendix "C", page 6). Yet he failed to avail himself of his rights in the District of Columbia prior to the expiration of the three (3) year Statute here when all he had to do was to file the suit in the District of Columbia and from time to time thereafter make some effort to serve the Appellees in the District. *Huysman* v. *Evening Star Newspaper Co.*, 12 App D.C. 586, (1898); *Maier* v. *Independent Taxi Owners Assoc.*, 68 App D.C. 307, 96 Fed(2d) 379, (1943); *Reynolds* v. *Needle*, 77 App D.C. 53, 132 Fed(2d) 161, (1953); *Bowles* v. *Dixie Cab Co.*, 113 Fed Supp. 324, (1953); and *Slater* v. *Cannon*, 93 Atl(2d) 92, (1952). This he never did until long after the Statute had run when on May 21, 1963, when the Appellee Lamb was in the District of Columbia, Appellant filed two suits against Appellees, one for libel against Appellee Lamb (CA 1291-63 U.S. District Court for D.C.) and the instant suit against both Appellees now on appeal herein. Appellant was fully cognizant of the importance of litigating his claims against the Appellees in the District of Columbia because his witnesses, his documents and other evidence were located and available in the District for he so stated to the Trial Court (see Appellant's Brief, Appendix C, pages 6, 7 and 8—see also JA 61). No reason was ever offered by Appellant for his delay in filing

suit in the District of Columbia when he knew the strength of his claims and the defenses to which it was subject. It is noteworthy that Appellant's Ohio litigation is still pending and untried after having been filed more than nine years ago. (See Appellant's Brief, Appendix "B").

Appellant attempts to rely upon the doctrine of estoppel as a bar to the Appellees' defense of the Statute of Limitations. The elements of this doctrine are misrepresentations by one person which misleads another who acts upon such misrepresentations in good faith to the latter's detriment. *Thompson* v. *Park Savings Bank,* 68 App D.C. 277, 96 Fed(2d) 549 (1938); 34 Am Jur page 324.

What evidence was there in the trial of this cause to sustain the application of this doctrine? Appellees state, respectfully, there was none. The evidence adduced was that the Appellant after waiting for a period of approximately a year and a half decided that he had waited long enough so he then filed suit in Ohio obtaining service of process there on the Appellees. He then sought by means of correspondence to discuss and settle the matter with the Appellees up to sometime in December, 1962 during the pendency of the Ohio litigation. There was never any affirmative inducement, representation, statement or paper writing as required by the District of Columbia Statute acknowledging the debt, agreeing to the correctness of it or assuring the Appellant that his claim would be paid. Nowhere in this Appeal does the Appellant point to any evidence which constitutes an affirmative inducement to him to refrain from filling the District of Columbia suit. The actuality is that there was nothing further that could be done because the Ohio suit was already then pending having been filed on April 28, 1959 (JA 76-88). Appellant attempts to rely on hearsay testimony of the witness, Sunne Miller, as to discussions with General McGrath in 1959 and 1960 wherein McGrath allegedly asked Appellant not to file any more suits against Appellee Lamb in the District of Columbia or else-

where. This was before and after the Ohio suit was filed. She also stated that she never really discussed the matter at any length at anytime with Appellee Lamb (JA 45). McGrath had no authority to bind Appellees. He had not been an officer of the corporate Appellee since 1957 (JA 54) or represented the Individual Appellee at any time with reference to Appellant's claims (see Trial Court's comments) (JA 44). Appellant's testimony was that he discussed his claims with Appellee Lamb in New York City on January 19, 1959 and that "he made no promises" (JA 56); "He would discuss the matter with McGrath," (June 1960, JA 59). Shortly thereafter—April 28, 1959 (JA 76-88) he filed suit against Appellees in Ohio. To apply estoppel against Appellees, Appellant must show some affirmative inducement by Appellees upon which Appellant acted to his detriment. What evidence of any inducement is there in this case which Appellees offered to Appellant upon which Appellant relied? Appellees, again, respectfully state —none! The D. C. Code requires a writing which not only acknowledges the debt but an unqualified and direct admission for which the party is liable and willing to pay. If the expressions relative to payment are equivocal, vague and indeterminate, leading to no certain conclusion, but at least to probable inferences, it ought *not* go to the jury as evidence of a new promise to revive the cause of action. *Hornblower* v. *George Washington University, supra; Moore* v. *Snider,* 109 Fed(2d) 840, 71 App D.C. 293, (1940); *Irvin* v. *Gradoville,* 221 Fed(2d) 544, 95 U.S. Court of Appeals, D.C. 265, (1955); *Catholic University of America* v. *Waggaman,* 32 Appeals D.C. 319, (1909); *Green* v. *Reeves,* 47 Appeals D.C. 86, (1917); *Hayden* v. *International Banking Corp.,* 59 Appeals D.C. 316, (1930); *U.S.* v. *Millsap,* 208 Fed Supp. 516 (Wyoming 1962). So also is the burden upon Appellant to prove the acknowledgment or new promise; *Dulberger* v. *Lippe,* 202 Atl(2d), D.C. Appeals, (1964).

Nor does the doctrine of estoppel aid the Appellant in his claim where the delay was his own doing. Appellant must

have shown prejudice because he relied upon what he claimed was a promise from the Appellees. And such action seeking to apply the doctrine of estoppel must have occurred prior to the running of the Statute of Limitations. Assuming, arguendo, that the verbal promise to settle that Appellant claims Appellee Lamb made occurred in 1962, it was long after the three (3) year Statute had run in the District of Columbia. Howard University v. Cassell, Supra. Even Appellant's assertion that the Appellees asked him to withhold the District of Columbia suit is not enough to bar the Statute of Limitations. 24 ALR(2d) page 1426, para. 11, and the cases cited there. Where in the evidence is there anything that the Appellees did upon which the Appellant relied to induce him not to file the District of Columbia suit within the three (3) year Statute? Appellees repeat that there is not one single fact in the entire record in this case which will support Appellant's claim of any inducement by the Appellees which prevented him, or upon which he relied, from filing suit in the instant case. Nor can Appellant show that he was prejudiced by anything that the Appellees did which delayed him in filing the District of Columbia suit. In fact, it would appear that the filing of the instant suit in 1963 apparently was an afterthought which occurred to Appellant when he filed it along with another suit (CA 1291-63, U.S. District Court for D.C.) claiming damages from Appellee Lamb for libel in a book written by Appellee Lamb (Pltfs. Exh. 4). This Court has recently held in a parallel situation involving the Statute of Frauds that a writing is required in order to take a claim out of the Statute (see *Ammerman* v. *City Stores Company*, #21097, decided April 4, 1968, 394 Fed(2d) 953. So too, a Trial Court commits error where it fails to dismiss a suit on a claim where the suit is filed more than three (3) years after the claim accrued. *Cassel* v. *Taylor*, 100 U.S. App D.C. 155, 243 Fed(2d) 261, (1957).

The facts illustrating the application of the doctrine of estoppel as to inducement are well set forth in the case

cited by the Appellant in his brief, *Glus* v. *Brooklyn Eastern District Terminal,* 359 U.S. 231 (1959) where the claimant Glus was fraudulently induced to delay the filing of his claim on the basis that it had seven years within which to file suit when this was not the truth. Another instance of inducement is the case of *McCloskey* v. *Dickenson,* 56 Atl(2d) 442, 76 WLR 146, (1947) and the Annotation under 24 ALR(2d) 1417 (1956). In this latter case, McCloskey had agreed to pay its former employee Dickenson for overtime when it had received word from the Maritime Commission as to Dickenson's claim. There came a time when McCloskey did hear from the Maritime Commission with reference to Dickenson's claim but it failed or refused to inform Dickenson of such a determination when Dickenson had been waiting for it delaying any suit that he intended to file. In these circumstances, the Court has held that there was an affirmative inducement and that the Statute would be tolled. Similarly, are the circumstances in the case of *Fontana* v. *Aetna Casualty and Surety Company,* 124 U.S. App D.C. 168, 363 Fed(2d) 297 (1966), also cited by the Appellant in support of his position wherein this court held that the Statute of Limitations does not begin to run until the discovery of the fraud. Here an employee had faked a compensation case and later acknowledged its falsity before the Compensation Commission. These are circumstances wherein the Courts have tolled the application of the Statute of Limitations because of fraud. In no instance or in any decision has there been a tolling of the Statute unless fraud or some unusual circumstance existed. Certainly none as such has occurred in the instant case. In the absence of fraud or some unusual circumstance, the courts have uniformly held that a writing is required acknowledging the indebtedness and its correctness in order stay the running of the Statute.

2. The Trial Court followed established procedure in setting aside a jury verdict when such verdict was not based upon the evidence and the law as instructed by the Court.

In recent years in order to prevent the necessity for retrying a case, this Court has suggested (and the Trial Courts have followed this suggestion) that a jury should be permitted to hear all of the evidence in the case and upon the conclusion of the evidence if the jury's verdict is not in accordance with the evidence and the law, the Trial Court should set aside the jury's verdict. This is precisely what happened in this case. *Morse* v. *Moretti,* No. 20,826 decided Jan. 25, 1968, U.S.C.A. D.C., not yet reported; *Shewmaker* v. *Capital Transit Co.,* 79 U.S. App D.C. 102, 143 Fed(2d) 564 (1959); *Reitan* v. *Travelers Ins. Co.,* 267 Fed(2d) 66, (C.A. Wisc. 1959); *Hook* v. *N.Y. Central R.R. Co.,* 214 Fed. Supp. 4, (1963) reversed on other grounds 327 Fed(2d) 259, (1964); *Stewart* v. *Gilmore,* 323 Fed(2d) 389, (1963 La.); *Tidewell* v. *Ray,* 268 Fed. Supp. 952 (1962 D.C. Miss.); *6551 Collins Ave. Corp.* v. *Miller,* 104 So(2d) 337, (Fla. 1958). It is the duty of a Trial Court to set aside a verdict where evidence is without dispute, *Carroll* v. *Seaboard Airline R.R. Co.,* 371 Fed(2d) 903; *U.S.* v. *Hess,* 341 Fed(2d) 444 (Colo. 1965); *Devlin* v. *Safeway Stores, Inc.,* 235 Fed. Supp. 882 (D.C. N.Y. 1964). *Williams* v. *Greenblatt,* 106 U.S. App. D.C. 335, 272 Fed(2d) 565 (1959).

The Trial Court carried out the plain directions of the Federal Court Rules of Civil Procedure in indicating the ground for her decision in granting a new trial. Rule FRCP 50(b)(1); *Montgomery Ward Co.* v. *Duncan,* 311 U.S. 243, 85 L.Ed 147; *Casper* v. *Barber & Ross, Inc.,* 288 Fed(2d) 379, 109 U.S. App. D.C. 383 (1961); *Moore* v. *Capital Transit,* 226 Fed(2d) 57, Cert. denied 350 U.S. 966, 100 L.Ed. 839. *Hanley* v. *Westchester Fire Insurance* Co., 284 Fed (2d) 409, Cert. denied 365 U.S. 869, 5 L.Ed 860, (Mich. 1959); *Miller* v. *Pa. R.R. Co.,* 161 Fed Supp 633 (D.C. D.C.) (1958); *Chester* v. *Scheleisner Co.,* 167 Fed Supp 697

(D.C. Md.) (1958); *Collins* v. *Risner,* 269 Fed(2d) 654, Cert. denied, 361 U.S. 924, L.Ed(2d) 240, (1959).

The controlling question is whether the verdict is sustained by substantial evidence. *Eggenberger* v. *Jurek,* 253 Fed Supp 630, (D.C. Minn. 1966). In the instant case, was there any evidence to overcome the defense of the Statute of Limitations? Appellees respectfully urge that a minute and detailed reading of the record will disclose no such evidence. Without such necessary evidence what was there to sustain the jury verdict?

Ordinarily the ruling of the Trial Court on an alternative motion for a new trial is not reviewable by this Court. *Bennett* v. *D.C. Transit System, Inc.,* 298 Fed(2d) 325, U.S. App D.C. (1962) citing *Cone* v. *W. Va. Pulp & Paper Co.,* 330 U.S. 212,216, 91 L.Ed. 849 (1947); *Jackson* v. *Wilson Trucking Company,* 100 U.S. App D.C. 243 Fed(2d) 212; *Simmonds* v. *Capital Transit Co.,* 79 U.S. App D.C. 371, 147 Fed(2d) 570 (1945); *Montgomery Ward* v. *Duncan,* 311 U.S. 254, 85 L.Ed. 147 (1940); *Woods* v. *Richmond & Danville R.R.,* 1 App D.C. 165 (1893); *Menneti* v. *Evans Construction Co.,* 259 Fed(2d) 357 (1958) (3rd Cir.) follows *Casper* v. *Barber & Ross, Supra,* in holding that normally the decision of a Trial Court in granting a motion for a new trial is ordinarily not reviewable, citing in support thereof the case of *Montgomery Ward Co.* v. *Duncan,* (*Supra*).

3. Appellant was experienced trial counsel who by his trial tactics prejudiced the jury against Appellees by the manner in which he tried his case.

Appellant, whose qualifications are set forth in his brief (pages 32-34) as well as in the transcript of his testimony on the trial of this cause (JA 32-39) established that he had been an attorney for many many years, the bulk of his experience being in the trial of many cases throughout this country. He devoted nearly two hours on one day of trial in reciting to the Court and to the jury his qualifications as an attorney, teacher, lecturer and recipient of many legal

awards. He has devoted as much time in his brief in restating his qualifications (see pages 32-34). He was not an ordinary litigant. He was well versed in the law and his experience in the practice of the law covered nearly twenty-nine years (1938-1967). He participated in the preliminary matters in the instant case in the Court below (Appellant's Appendix "C"), he personally directed the trial of his case in the Court below, except when he himself was testifying, and is one of Counsel in this Appeal. In the presentation of his case, which took some actual thirteen days of trial, he was constant in his reference to the Appellees as being communistic in attitude and action. With a broad brush, he painted the Appellees as enemies of the country by calling them and referring to them, particularly the individual Appellee Lamb, as a sympathizer of and contributor to communist causes and one who actually supported and wrote with empathy about communist matters. While he would decry the effect of the nearly 100 exhibits which he introduced into the trial of this cause, 25 of such exhibits referred to the Appellee Lamb as a communist or communist sympathizer. These exhibits were read in detail to the jury not to show the extent of Appellant's services for which he was suing, but to stigmatize Appellees as communists. The constant reference to the individual Lamb as being a communist or communist "fellow traveler" or devotee of communist ideology prejudicially brainwashed the jury against the Appellees by designating them as enemies of the United States who were to be punished by assessment by the jury of a huge award against them. The trial record discloses 81 references to the individual Lamb as being a communist sympathizer, associate or counsel, at a time in U.S. history when to be a communist or communist sympathizer is to be an enemy of the United States. The Internal Security Act of 1950 (U.S. Code 1250, Sec 781) enacted September 23, 1950, described communism and the kind of government that it was and how it sought to control nations through fear, terrorism and brutality. Congress has found that there

exists a communist worldwide revolutionary movement whose purpose is to establish a worldwide totalitarian dictatorship through the medium of a worldwide communist organization. The communist practice is to establish such organization by treachery, deceit, infiltration, espionage, terrorism and sabotage. Thus, the moment you mention "communist" in our country that is the very moment that you select as a target for hatred and venom the person that you brand as a communist. At the conclusion of all of the evidence and before the Court had begun to instruct them, the jury was already inflamed and prejudiced against the Appellees. Under New York law to write and say that a lawyer is a communist or that he has acted as an agent of the Communist Party, and is a believer of its aims and methods, is libelous. *Grant* v. *Readers Digest Association,* 151 F 2d 733, Cert. denied 326 U.S. 707, 90 L.Ed. 485 C.C.A. New York 1946. A broadcast statement that a government official and economist was a member of the Communist Party contrary to her government oath of office was slanderous per se. *Remington* v. *Bentley,* 88 F.Supp. 166 (D.C. New York 1950).

Appellant's method of trial and his unorthodox presentation of his evidence confused the jury. One such example is the Appellant's opening interrogation of the defendant Lamb for two full trial days—October 17-18, 1967. His repeated attempts to bring in extraneous and irrelevant matters despite repeated urging by the Trial Court that he proceed to present the necessary basic evidence in his case relating to his claim (JA 19-20-24-25-26-47) contributed to such jury confusion and animus toward Appellees.

The record is replete with references to the Appellee Lamb as Communist or Communist sympathizer. This thread of hatred and prejudice applied to the individual defendant by innumerable references to him in the course of the trial created the prejudice which resulted in the jury's verdict. While the Appellant will decry such name calling

for any attempted reference to the individual Appellee as a communist, nevertheless, it was scurrilously present throughout the entire trial. While the Appellant claims that the reference to communism was merely an effort to show the kind of evidence that he had to overcome in the Federal Communications case, nevertheless, the constant repetition of the word "communist" or "communist sympathizers" had its effect on the jury and their verdict. In fact, one of the members of the jury (No. 4) was so incensed that he sought to grant Appellant the full amount of his claim necessitating further instruction by the Court to the entire jury that they retire to the jury room a second time and arrive at a unanimous verdict. It was inconceivable that the Appellant could have been entitled to any sort of a verdict of the size the jury returned based upon the services that he had rendered for the individual Appellee. Such a verdict could only stem from bias and prejudice of the jury generated by the Appellant's constant repetition of "communist" and "communist sympathizer". Since the Internal Security Act was enacted in 1950 (U.S.C. title 50, Para 781 et Seq) decision after decision has held that to call a person or write about a person as a communist or communist sympathizer is slanderous or libelous as the case may be, because you hold that person up to public hatred and contempt. Such statements have therefore become libelous per se. *Utah State Farm Bureau* v. *National Farm Union Service Corp.*, 198 Fed(2d) 20, 33 ALR(2d) 1186; *Cole* v. *Loews, Inc.*, 8 FRD 508 185 F 2d 641, cert. denied 340 U.S. 954, 95, L.Ed. 688 (Calif.); *Spannel* v. *Pegler*, 70 Fed Supp 926 (Conn. 1947) holding that a newspaper article charging the plaintiff were, if not members of the Communist Party, at least sympathetic to its objective was libelous per se since the difference between being a member of the Party and being a fellow traveler or sympathizer is one of degree only. Even falsely referring to someone in a newspaper article by innuendo as being suspected of communist activities without proof of special damage, is actionable libel as tending to regard persons about whom such comments have been made

with scorn and hostility. *Foltz* v. *News Syndicate Company,* 114 F. Supp 599. From the initial stages in the case when Appellant sought to show that the Appellee Lamb had paid some $5,000.00 as a fee to Appellant's law partner, General McGrath, for alleged visits to the late Senator McCarthy to convince the Senator that the Appellee Lamb was not a communist (JA 23-63-64) until the closing argument of Appellant's counsel disclaiming any desire to name Lamb Appellee as a communist (Judgment of Court, JA 16-17), the Appellee Lamb was indelibly stamped in the eyes and minds of the jury as a communist, one who was the enemy of the United States Government, its peoples, and in fact, the jury itself. We have been taught by experience that inflamatory and irrelevant matters which are allowed to come to the attention of the jury quickly results in injustice and in an abortion of truth. When this happens, a fair and impartial trial is not granted to either party as required under our system. (See majority opinion No. 21-281, U.S.C.A. D.C., *Barber* v. *U.S.A.* decided March 8, 1968) 392 Fed(2d) 519.

Early in the trial, the Appellant's attention was called by the Court to the unorthodox manner in which he began to try his case, experienced trial counsel though he was. (JA 19-20-24-27-47-54-64). He began in detail to question the Appellee Lamb as his first witness with reference to his alleged communist affiliations, representations, sympathies and associations. For example, he began with the McFarland letter, which was the notice to the WICU-TV television station owned by Corporate Appellee, that hearing would be held on the matter inquiring if the Appellee Lamb had not made false statements in connection with this application as an officer of the Corporate Appellee (JA 80); whether or not the Appellee Lamb did not know the well-known communist Louis Budenz as the editor of the Daily Worker, (JA 22); whether or not he had not sent birthday greetings to the well-known communist newspaper, the Daily Worker, (JA 22); whether or not he had not

furnished articles for publication in the Daily Worker, (JA 23); whether or not he had not represented Gus Hall, who was and is a well-known communist, who was later convicted in one of the Smith Act cases in the early 1950's, (JA 25-26); whether or not he had not been an attorney for the International Labor Defense, which was a communist front organization (JA 26); whether or not he had not been very much interested in communist leaders in his earlier days, had he not written very favorably about two distinguished Chinese communist women in his (Lamb's) book "Soviet Russia"; had he not written praising Sun Yat Sen, the first President of the Chinese Republic; Lenin, the father of modern day communism, Krupskaya, Lenin's widow and Madame Sun Yat Sen quoting Lamb as writing:

> "How wonderful it would be to visit the immortal Bolshevik leader during these days of the trimphant progress of socialism in the USSR and who would not sit at the feet of China's first Republican President and listen to him say 'China work with the Soviets' " (JA 27-28-29).

This latter exhibit with reference to the Appellee Lamb's book was offered as an exhibit from the Federal Communications hearing but the detailed interrogation of the Appellee Lamb about this book of his had nothing to do with the value of the legal services that the Appellant had rendered allegedly on behalf of Lamb, but merely discredited Lamb and held him up to ridicule and contempt as a Soviet sympathizer in the eyes of the jury. This same tactic was employed further in connection with the Appellant's interrogation of the Appellee Lamb about one Ernest Thaelmann, who allegedly was a Communist who had been arrested in Germany sometime in 1939. Allegedly at Lamb's request, Lamb sought of the German government to appear in Germany and defend Thaelmann (JA 30-31-32). True, it was an exhibit which had been used in the F.C.C. case, but the Appellant's use of it to smear the Appellee Lamb as a Communist sympathized and the efforts to which he would

go to represent communists again denigrated the Appellee Lamb, and consequently both Appellees in the eyes of the jury. Appellant devoted one full day of trial—October 23, 1967—to detail to Appellee Lamb's alleged communistic leanings and sympathies. In Appellant's counsel's closing argument to the jury he again emphasized certain excerpts from Lamb's book "The Planned Economy of Soviet Russia" as advocating the overthrow of the U.S. Government. (See judgment of Trial Court, (JA 16-17)).

4. Appellant's own delay created the bar to his claim.

Appellant based his claim in this case upon those legal services which he claims he had rendered to the Appellees from 1954 and ended with his billings on June 18, 1957 (JA 48). His testimony established that from 1957 until 1959 he had repeatedly written to the Appellee Lamb requesting payment of his claim (JA 48-49-50-51). He further testified that he had again discussed this matter with the Appellee Lamb in New York on January 19, 1959 (JA 52-53). In this conversation, he threatened Appellee Lamb with suit on his claim in the District of Columbia if it were not paid (JA 54). Appellant stated "I didn't make any promises * * * (JA 56) to Appellee Lamb about waiting for payment before filing suit. Thereafter, he did file suit in the Court of Common Pleas for Lucas County, Ohio, on April 28, 1959 (JA 76). He was well aware at the time of the filing of this Ohio suit that the Appelles were non-residents of the District of Columbia and that in order to obtain valid service of process upon them he must serve them in their place of residence, which was Toledo, Ohio, or personally in the District of Columbia. This he did in Ohio for an amount and upon a claim identical to the one that he filed later in the District of Columbia. He was aware too, at the time of the filing of the Ohio suit that the Ohio Statute of Limitations on this claim was six (6) years and that nearly two of the six years had elapsed since he had rendered his bill to the Appellees on June 18, 1957 (Ohio

Statute 2305.07). Thereafter in 1962 Appellant wrote to the Appellee Lamb seeking to discuss, and hoping to settle the Ohio suit (JA 60). In his brief, he states that he obtained service of process in 1963 upon the Appellees, Lamb individually and as an officer of the Corporate Appellee, when Lamb came into the District of Columbia in connection with the publication of a book which he had written. This was on May 21, 1963 (Appellant's Brief, Appendix "C", page 6). He was certainly aware at that time that more than three years had elapsed since his claim had accrued and that it was barred by the District of Columbia three (3) year Statute. He knew too, that had he desired to file his claim in the District of Columbia where all of his evidence, testimony and records were situated that he would have had to file his suit in the District of Columbia no later than June 17, 1960—within the three year period of time after he had billed these Appellees on June 18, 1957. He, as an experienced attorney, knew that he could stop the running of the Statute against a non-resident of the District of Columbia by the mere filing of the suit in the District of Columbia and by diligence on his part, from time to time thereafter, seek to obtain service of process upon the Appellees in the District of Columbia when they came into the District of Columbia. (1898) *Huysman* v. *Evening Star Newspaper Co., supra;* (1938) *Maier* v. *Independent Taxi Owners Assoc., supra;* (1943) *Reynolds* v. *Needle, supra;* (1953) *Bowles* v. *Dixie Cab Co., supra;* (1952) *Slater* v. *Cannon, supra.* He was well aware of the difficulty that he would have with his present suit because of the three (3) year Statute of Limitations and he so acknowledged to the Court when he personally appeared in a preliminary matter before the Trial Court as well as in the brief filed in this Court (See Appendix "C" Appellant's Brief). Yet in the interval between 1959 and 1963 he took little or no action to press his claim properly filed and timely filed in the Ohio Court. The very person who had intimate knowledge of the basis for

his claim for payment of the legal services that he alleged he had rendered, was his former law partner, former Attorney General Howard McGrath, who died sometime in September, 1966. While he had repeatedly, according to his testimony in the Trial Court (JA 56-57-58), discussed the matter with General McGrath as late as 1961 or 1962, yet during the entire period of litigation with the institution of the Ohio suit in April of 1959 until General McGrath died in September, 1966, he took no action whatsoever to take advantage of the benefit of General McGrath's testimony either in the Ohio suit or in the District of Columbia suit which had been filed on May 21, 1963 (JA 62). Thus, even in the District of Columbia suit where General McGrath's testimony may have been perpetuated by deposition during the period from at least June, 1957 until September, 1966, the Appellant neglected, failed or refused for whatever reasons are best known to himself, to take advantage of such vital testimony of one who had been his law partner and close friend and one who was intimately familiar with the basis and validity or invalidity of his claim. Less reason is there for Appellant's failure to take advantage of the availability of General McGrath's testimony within the seven (7) year period 1959-1966, that he lived during the pendency of Appellant's two suits, one in Ohio and one in the District of Columbia. Appellant stated that the natural place to try his lawsuit was the District of Columbia (JA 61) and Appellant's brief appendix "C", page 6). Yet for nearly six (6) years after his claim accrued he virtually abandoned it in the District of Columbia and did nothing about it. Appellees respectfully urge that the legal principle cited and restated in Glus v. Eastern District Terminal (1959) 359 U.S. 232, "that no man may take advantage of his own wrong" is particularly applicable to the facts in the instant case.

Appellant urges as an equitable basis, delay on the part of the Appellees in the adjudication of the suit which Appel-

lant filed in Ohio. And says that this is attributable to the defendant's tactics (Page 16, Appellant's Brief). It is the obligation of the Appellant in any proceeding to prosecute his claim and failure so to do is grounds for dismissal of his claim by the Court. (See Ohio rules 2323.04 Ohio Statutes, Title XXIII—Courts—Common Pleas and Federal Rules of Civil Procedure, Rule 41(b); Link v. Wabash Railroad Company, 370 U.S. 629 8 L.Ed. (2d) 737, 1962).

Appellant overlooks his obligation as the moving party to dispose of the litigation which he initiated in Ohio in 1959. That court first acquired jurisdiction of the Appellant's claim and should proceed without interference from the District of Columbia court in disposing of the matter. *Kline* v. *Burke,* 260 U.S. 67 L.Ed. 231; *Wilson* v. *Schnettler,* 365 U.S. 381, 5 L.Ed.(2d) 620; *Smith* v. *Leigh,* 248 Fed(2d) 87, 101 U.S. Court of Appeals D.C. 227; *Frazier* v. *Frazier,* 61 Fed(2d), 61 Appeals D.C. 279. Appellant elected to prevent the Statute of Limitations from running against his claim by timely filing of his suit in Ohio. He attempted to test the District of Columbia Statute of Limitations with the instant litigation in the face of the clear requirement of a writing, or as he now claims by estoppel, which he was unable to sustain. He seeks in this appeal by this dual litigation to select the Court which ultimately will be most beneficial to him. This he should not be permitted to do.

Appellant cites *Burnett* v. *N.Y. Central R.R. Co.,* 380 U.S. 424, (1956) as authority, on an equitable basis, for tolling the District of Columbia Statute of Limitations because he had filed his initial suit in Ohio within that state's Statute of Limitations. But the facts in "Burnett" and the Supreme Court decision thereon are repugnant to the facts in this case on appeal. In, "Burnett", petitioner, an injured employee, improperly chose the venue of his suit and in prosecuting his appeals on this point was eight days late beyond the Federal Statute of Limitations. The Supreme Court held that the FELA limitation period was not totally

inflexible but under appropriate circumstances it may be extended beyond three years (Page 428), citing *Glus* v. *Brooklyn Eastern Terminal, supra.* A delay of eight days in "Burnett" is far different from a delay of six years in the instant case. Moreover, the Supreme Court want on to point out (Page 428):

> "Statutes of Limitations are primarily designed to assure fairness to defendants. Such statutes promote justice by preventing surprises through revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitations and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.", citing Order of Railroad Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 349, 88 L.Ed. 788, 792. "Moreover, the Courts ought to be relieved of the burden of trying stale claims when a plaintiff has slept on his rights."

"Burnett", supra, supports Appellees as does *Berry* v. *Pacific Sportfishing, Inc.,* 372 Fed.(2d) 213, 214 (1967), cited by Appellant in support of his position.

In *Cassell* v. *Taylor, supra,* page 155, this Court cited with approval, *Holmberg* v. *Armbrecht,* 327 U.S. 392, (1946), stating:

> "That if the action can be characterized as one of law—(and Appellant's case is one at law under an implied contract for alleged legal services rendered)—federal courts have consistently interpreted congressional silence as inferring a 'federal policy to adopt the local law of limitation'. Holmberg v. Arbrecht, (1946) 327 U.S. 392, 395, 66 S. Ct. 582, 584, 90 L.Ed. 743. Likewise, 'where the equity jurisdiction is exclusive and is not exercised in aid or support of a legal right, state Statutes of Limitations at law are inapplicable and the federal court applies the doctrine of laches as controlling', Roland v. Todd, 1940, 309 U.S. 280, 289, 60,

> S. Ct. 527, 532, 84 L.Ed. 754. In those instances where the Court has concurrent jurisdiction to grant either equitable or legal relief in the enforcement of the asserted obligation, equity follows the law and the equitable remedy will be withheld if local statutes of limitations would bar the concurrent legal remedy. Cope v. Anderson, 1947, 321 U.S. 461, 67 S. Ct. 1340, 91 L.Ed. 1602".

Appellees respectfully state that *Herb* v. *Pitcairn,* 325 U.S. 77 (1945) cited by Appellant has no application herein.

5. The Verdict of the Jury Was Not Based Upon the Evidence but Resulted From Bias and Prejudice

There can be little doubt that the jury verdicts were excessive, not based upon the evidence but upon bias and prejudice when viewed against the background of the evidence adduced. It is evident, too, that the jury disregarded the Court's instructions in arriving at their verdict.

In her instructions to the jury (JA 65-66-67-68) the Court was meticulous in pointing out the differences in responsibility of a corporation for its obligations as opposed to the absence of individual liability as an officer of a corporation (JA 65). She reviewed the services which had been allegedly rendered by Appellant in connection with the injunction suit wherein Appellee Lamb was a party against those services allegedly rendered for the Corporate Appellee in the Federal Communications case. She described the services rendered in the injunction suit as approximately 195 hours against the 3000 hours approximately in the Federal Communications matter on behalf of the Corporate Appellee (JA 67). Appellant had billed Appellee Lamb for $200,000.00 for services allegedly rendered him (JA 88-101). Viewed against this background, it is clear that the jury arrived at its verdict against the Appellee Lamb not upon the evidence, but upon animus against him stemming from the alleged Communist affiliations. While Appellant seeks to minimize the inflammatory exhibits and

his argument to the jury, the actuality is, that the constant communist reference and the constant use of the communist exhibits had its effect upon the jury and the verdict at which they arrived.

Appellant relies heavily upon the fact that there was no objection to the argument. What was objected to throughout the entire course of the trial was the reference to the Appellee Lamb as communist or communist sympathizer with the resulting jury bias.

He buttresses the amount of the verdict upon statements from Appellee Lamb's book "No Lamb for Slaughter" as earning a million dollars a year as evidencing the value of his services. Repeatedly, through the course of the trial, the Court called Appellant's counsel's attention to Appellant's constant use of large sums of money and large figures which had no basis in the evidence. This same argument Appellant urges upon this Court. The testimony of his witnesses as to the value of the fee for the services that he has rendered came from one witness, Heller, who testified that he had been in private practice here in the District of Columbia and that he had heard in the office in which he had worked that the rate of $35.00 per hour for services rendered by a senior partner was a fair one. Using this figure, which was pure hearsay, he arrived at a basis of $300,000.00 to $700,000.00. This witness himself had never practiced before any administrative body, had never represented anyone in a Federal Communications case and the bulk of his practice was in other fields. While objection was made to this witness' testimony as being unqualified, the Court permitted it commenting that Appellee's objection went to the weight of the evidence rather than to the evidence itself (JA 62). Appellant's witness, McGroary, a practicing attorney in the District of Columbia, also testified that he had never practiced before the Federal Communications Commission, that in his opinion the reasonableness of the fee was based upon a percentage of the value of the televi-

sion station saved and would be 10 to 20 per cent of the value of the station which had been given him by Appellant's counsel as being worth from six to eight million dollars. He, therefore, arrived at a fair fee as being somewhere between $600,000.00 and $800,000.00. This witness also testified that prior to his appearance as a witness in this case, he had discussed Appellant's claim with him and that he—Appellant—had mentioned the figure of $500,000.00 as being the amount sued upon in this case (JA 62). It is not difficult from this witness' testimony to ascertain the basis for his fee evaluation. Finally, Appellant uses the evidence of Appellees' witness, Robb, who testified that, in his opinion, the $35.00 per hour figure was a fair one. On this basis Appellant asserts that his fee would be the $35.00 per hour times the 3,000 hours spent, equalling $105,000.00. This, he says, justified the jury's award of $400,000.00.

Reference has been made above to the bias and prejudice of the jury in arriving at their verdict. An example of this was the action of juror No. 4, John L. Baylor. Having in mind that the total amount claimed by the Appellant in the Trial Court was $500,000.00, this juror when polled as to his verdict at the conclusion of the case, stated that his verdict was $200,000.00 against the Appellee Lamb and $300,000.00 against the Corporate Appellee. The verdict not being unanimous, the Court instructed the jury to return to the juryroom to arrive at a unanimous verdict. This they did, shortly thereafter all agreeing on the two separate amounts of their verdict, $150,000.00 against the Appellee Lamb and $250,000.00 against the Corporate Appellee, Dispatch, Inc. This constituted a duplication of the awards because the verdict against the Appellee Lamb could only be predicated upon services rendered, if at all, for the Corporate Appellee. In part, the verdicts reflect Appellant's unrelenting and repeated reference to large sums of money and large figures which had no basis in the evidence (JA 55).

CONCLUSION

Appellees, therefore, respectfully submit that the judgment of the Trial Court is based upon the law and the evidence adduced in this case, is correct in all respects and should therefore be ..... AFFIRMED.

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August 14, 1968

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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,686

RUSSELL MORTON BROWN, *Appellant,*

v.

EDWARD OLIVER LAMB,

and

DISPATCH, INC., a Pennsylvania corporation, *Appellees.*

Appeal From the United States District Court for the District of Columbia

REPLY BRIEF FOR APPELLANT

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September 15, 1968

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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REPLY BRIEF FOR APPELLANT

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1. Appellees' Claim That the Jury Was Prejudiced Against Them Is Wholly Without Foundation.

The issue as to Communist attachments of Edward Lamb, *vel non*, was tendered by the Federal Communications Commission, and appellant attorney successfully resisted the effort to prove the charges. This was the basis upon which he sought to be paid his fees.

Now the appellee claims the jury was prejudiced by being informed that the Federal Communications Commission had charged him with communistic attachments.

Clearly appellant could not have conducted his case without showing the jury what were the issues in the F.C.C. proceeding, without describing the evidence and showing the nature of the problem, the novelty and difficulty of the assignment, and the skill required to meet the challenge. This is expressly sanctioned by Canon 12 of the American Bar Association Professional Ethics (App. A, p. a2).[1] It was shown without doubt that a favorable result had been obtained in the F.C.C. proceeding and the nature of counsel's accomplishment could not fairly be gauged without a consideration of the evidence brought forward against his client.

The language of appellees' brief (p. 12) wholly distorts the trial record, saying that the appellant "was constant in his reference to the appellees as being communistic in attitude and action." Without record references he says there are "81 references to the individual Lamb as being a Communist sympathizer, associate or counsel."

In absolute fairness it should be noted that these were not references made by appellant but were simply demonstrations of what the F.C.C. record brought forth against the client. These were expressly and unconditionally agreed to by the appellees:

With reference to the interview with Mme. Krupskaya, Lenin's widow, in Russia, reported by Mr. Lamb in the "Daily Worker," when this was offered as an exhibit, the record plainly and clearly shows the terms upon which it was received in evidence:

(Tr. 179-181):

> MR. BAKER: Your Honor, if Mr. Burke is offering this as one of the exhibits in the FCC record, I would have no objection.

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[1] This reference is to the appellant's principal brief.

MR. BURKE: That is correct.

THE COURT: Admitted.

Again, with reference to the McFarland letter, which was the very basis of the formal accusation by the Federal Communications Commission, this was offered in evidence (Tr. 233) and the record shows its reception.

> MR. BAKER: Well, it is part of the FCC record, Your Honor, and I have no objection to it if it is in the record." (JA 70).

The fact that this case involved alleged Communist attachments could not easily be hushed up or swept under the rug, and appellant couldn't very well have been expected to show that his work was performed in a very novel, challenging and serious matter, without informing the jury as to the nature of the issue.

It may be noted in response to the argument of appellee that the Court specially instructed the jury on these matters (appellant's Brief pp. 24-25) not to consider whether or not there was Communist activity on Mr. Lamb's part and they were not to be prejudiced against him because of the Federal Communications Commission's allegations concerning him (appellant's Brief, p. 25).

This attempt to inject the argument of jury prejudice is a total evasion of the merits of the case. It would downgrade the jury verdict to a meaningless formality, but such is not the law. The courts do not assume that jurors will fall short of a proper performance of their duties. Thus in *Wilkerson* v. *McCarthy*, 336 U.S. 53 (1949) the Court said (p. 62):

> In rejecting a contention that juries could be expected to determine disputes on whim, this Court speaking (63) through Mr. Justice Holmes said:
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> 'But it must be assumed that the constitutional tribunal does its duty, and finds facts only because

> they are proved' *Aikens* v. *State of Wisconsin,* 195 U.S. 194, 206 (1904)

This Court has clearly followed and applied the same rule. *Crockett Engineering Co.* v. *Ehret Magnesia Mfg. Co.,* 81 App. D.C. 159, 162, 156 F.2d 817, 820 (1946), where the Court said:

> "We cannot assume that the jury disregarded the other instructions and ignored the facts developed at the trial."

The rule is well-stated in 5 American Jurisprudence 2nd, p. 329 "Appeal and Error", § 890, pointing out that there is a presumption the jury followed its instructions, correct or incorrect. The very heart of the jury system rests upon this presumption so that if the instructions are wrong, the jury has been misled and the decision may be reversed; if the instructions are correct, the jury was properly guided in its deliberations and followed these instructions to reach a verdict which is constitutionally impregnable, if it is based upon evidence.

Conflicts in the evidence are for the jury to resolve. On appeal from a judgment for defendant, n.o.v., the reviewing court must assume the evidence in favor of the plaintiff to be true. If the evidence so considered is such that reasonable men might reach different conclusions, the jury's decision is not to be disturbed. *Tennant* v. *Peoria & P.U. Ry. Co.,* 321 U.S. 29, 32-33, 35 (1944), and other cases cited in appellant's Brief (pp. 45-49).

A plain misstatement of fact is made in appellees' Brief (p. 22) to the effect that Attorney Heller had testified that the rate of $35.00 per hour was charged by senior partners in the firm with which he had been associated. The correct testimony given by Attorney Heller was that senior members of the firm charged fees of $100.00 per hour. (Tr. 984, J.A. 62)

Appellees' brief (p. 8) ingenuously says even if "the verbal promise to settle" occurred in 1962 it was after the Statute had run. The transcript shows directly that the date of that conversation was in the first week of June, 1960. (Tr. 847-850, J.A. 57) On the basis of Mr. Lamb's express, earnest request made during this telephone call, appellant deferred filing suit in the District of Columbia. The date was June, 1960, still within the Statute of Limitations—not 1962, as appellees' brief puts it. That was a major part of the "affirmative inducement" found by the jury verdict in accord with the Court's instructions (appellant's Brief, 12-13, and authorities cited, note 3).

Far from attempting to besmirch the reputation of Appellee Edward Lamb, appellant had strongly and seriously marshalled all the evidence he could possibly discover in his defense and this was summarized in a document introduced in evidence in this trial (Plaintiff's Exh. 27), "Applicants Objections to the Broadcast Bureau's Proposed Findings of Fact, and Applicant's Proposed Findings (Revised)," where, over Brown's signature, he said that Lamb had been "anti-Communist", criticized by the Communist Party as "hostile" to their aims. He summarized (p. 112-113) the testimony of witnesses he had brought to the witness stand and examined in support of Lamb's qualifications. As Lamb's counsel he wrote in this document (p. 112):

> "This testimony was given by reputable, respectable men of affairs, whose position and reputations are beyond (113) question for honor, integrity, loyalty and Americanism. In no way were they challenged or contradicted. The anti-Communist activities they relate from Edward Lamb's life, from 1931 to the present time, must overwhelmingly countervail the scum brought forward by the Broadcast Bureau. It must be obvious that sober, considered judgment requires a finding that Lamb's militant, open, unequivocal per-

> sonal independence and loyalty to the United States are plainly disclosed, as against the fanciful deductions, imaginative inferences, and sinister implications of his detractors."

Appellees' counsel could have read this to the jury if there was the slightest question in his mind as to their feelings. He could have questioned appellant about these statements which he wrote personally, if there was any danger of confusion. It is pitifully late to be complaining of his own lack of resort to a document which was fully before the Court and jury for all purposes.

This quoted language shows how forcefully and strongly appellant took up the cudgels for his client.

After outlining various steps taken to find testimony favorable to his client, appellant testified that editorials from the Erie Dispatch newspaper (owned by Edward Lamb) had been brought forward in behalf of his clients. He explained fully the tactics used to secure a favorable decision (Tr. 732):

> "Well, the purpose was to show that the Broadcast Bureau had brought forward only one side of the man's life and that they had unfairly attempted to bring to the hearing all of the connections from which a person could draw a conclusion that he had improper associations, or the kind of associations that would make it look as if he had not told the truth in his denials, but these other materials that we brought forward were designed to show that his activities were of a broad range and that he was not particularly concerned with a particular political policy or to raise questions of fairness in an attempt to say that if you view this altogether there is really no basis for concluding that the man didn't tell the truth—and (733) that is just about the way it wound up.

CONCLUSION

The entire thrust of appellees' argument is that there is no room for estoppel in the absence of a written instrument; and the jury, they argue, should have come to a different conclusion on the facts, but were misled by this Communist bogy-man.

No ground is set forth which would save the judgment n.o.v. from reversal, and it is respectfully submitted the order for a new trial is an unconstitutional invasion of the jury's province. The judgment and order for new trial should be vacated, and the jury verdict reinstated with directions.

Respectfully submitted,

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